S. HRG. 99-808

ANTITRUST REMEDIES REFORM

HEARINGS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2022

A BILL TO AMEND THE CLAYTON ACT REGARDING ANTITRUST ENFORCEMENT

AND

S. 2162

A BILL TO PROMOTE AND IMPROVE EFFICIENT AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS

MARCH 21, APRIL 15, AND MAY 7, 1986

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CONTENTS

OPENING STATEMENTS

Page

Thurmond, Hon. Strom (chairman) ... 1, 155, 219

Metzenbaum, Hon. Howard M ... 2

PROPOSED LEGISLATION

Text of S. 2022—A bill to amend the Clayton Act regarding antitrust enforcement ... 5

Text of S. 2162—A bill to promote and improve efficient and effective enforcement of the antitrust laws ... 16

CHRONOLOGICAL LIST OF WITNESSES

Friday, March 21, 1986

Ginsburg, Hon. Douglas H., Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, DC ... 23

Panel consisting of: Donald F. Turner, Esq., Wilmer, Cutler & Pickering, Washington, DC; Hon. Robert Abrams, attorney general, State of New York, accompanied by Lloyd Constantine, Assistant Attorney General, Antitrust Division; Charles B. Renfrew, director and vice president, legal, Chevron Corp., San Francisco, CA; and Steven C. Salop, professor of law and economics, Georgetown University Center, Washington, DC ... 52

Tuesday, April 15, 1986

Ginsburg, Hon. Douglas H., Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, DC, accompanied by Steve Cannon, Deputy Assistant Attorney General ... 156

Panel consisting of: Dirk Soutendijk, vice president, general counsel, and secretary, Union Camp Corp., Wayne, NJ, on behalf of Coalition For Antitrust Remedies Reform; Alan Wiseman, Esq., Howrey & Simon, Washington, DC, on behalf of U.S. Chamber of Commerce; James T. Halverson, Esq., Shearman & Sterling, New York, NY, and chairman, section of antitrust law, American Bar Association; H. Laddie Montague, Jr., Esq., Berger & Montague, Philadelphia, PA; and Lloyd Constantine, assistant attorney general, State of New York, New York, NY ... 169

Wednesday, May 7, 1986

Panel consisting of: Stephen D. Susman, Susman, Godfrey & McGowan, Houston, TX; Griffin B. Bell, King & Spalding, Atlanta, GA; and Ernest Gellhorn, Jones, Day, Reavis & Pogue, Washington, DC ... 220

Panel consisting of: James T. Halverson, Shearman & Sterling, New York, NY, and chairman, section of antitrust law, American Bar Association; John A. Irvine, Porter & Clements, Houston, TX, on behalf of the U.S. Chamber of Commerce; Monroe G. Milstein, president, Burlington Coat Factory Warehouse Corp., Burlington, NJ, on behalf of the Association of General Merchandise Chains, Inc.; and Thomas R. Long, senior vice president and general counsel, Westvaco Corp., New York, NY, on behalf of the National Association of Manufacturers ... 289

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Page

Abrams, Hon. Robert:
- Testimony ... 71
- Prepared statement ... 74
- Letter to Chairman Thurmond, responding to questions submitted by the Chairman and Senator Metzenbaum ... 85

Bell, Hon. Griffin B.:
- Testimony ... 246
- Prepared statement ... 251
- Response to questions submitted by Chairman Thurmond and Senator Specter ... 261

Constantine, Hon. Lloyd ... 204

Gellhorn, Ernest:
- Testimony ... 265
- Prepared statement ... 269
- Response to questions submitted by Chairman Thurmond and Senator Specter ... 284

Ginsburg, Hon. Douglas H.:
- Testimony ... 23, 156
- Prepared statement ... 27, 159
- Response to questions from Senators Leahy and Specter ... 165

Halverson, James T.:
- Testimony ... 187, 289
- Prepared statement ... 190, 294
- Response to questions posed by Senator Simon during the hearing ... 198
- Excerpt from ABA Antitrust Section, Monograph No. 11 ... 216
- Response to questions of Chairman Thurmond and Senator Specter ... 319

Irvine, John A.:
- Testimony ... 322
- Prepared statement ... 324

Long, Thomas R.:
- Testimony ... 346
- Prepared statement ... 349
- Response to questions from Senator Specter ... 355

Milstein, Monroe G.:
- Testimony ... 330
- Prepared statement ... 332
- Response to questions from Chairman Thurmond ... 343

Montague, H. Laddie, Jr.:
- Testimony ... 199
- Response to questions of Senator Specter ... 201

Renfrew, Charles B.:
- Testimony ... 94
- Prepared statement ... 97
- Response to questions from Chairman Thurmond and Senator Metzenbaum ... 110

Salop, Steven C.:
- Testimony ... 119
- Prepared statement ... 122
- Response to questions from Chairman Thurmond and Senator Metzenbaum ... 149

Soutendijk, Dirk:
- Testimony ... 169
- Prepared statement ... 171
- Response to questions from Senators Specter and Simon ... 179

Susman, Stephen D.:
- Testimony ... 220
- Prepared statement ... 227
- Response to written questions ... 244

Turner, Donald F.:
- Testimony ... 52
- Prepared statement ... 56
- Responses to written questions from:
  - Chairman Thurmond ... 68
  - Senator Metzenbaum ... 70

Page
Wiseman, Alan:
    Testimony 181
    Prepared statement 183

APPENDIX

Prepared statements from:
    National Association of Manufacturers 359
    The Business Roundtable 363

ANTITRUST REMEDIES REFORM—S. 2022 AND S. 2162

FRIDAY, MARCH 21, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Metzenbaum, Grassley, and McConnell.

Staff present: Kenneth Starling, chief antitrust counsel; Victor B. Maddox, counsel; Ally Milder, counsel, and Eddie Correia, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

Today, the committee is opening a series of important hearings on proposals to reform the antitrust laws. These hearings will focus primarily on a comprehensive recommendation by the administration that the antitrust laws should be revised or clarified in a number of areas.

The administration's legislative package, which I have recently introduced, is the product of a yearlong evaluation of antitrust and competition policies by two Cabinet Councils. The bills involve five areas of antitrust law: Damages, mergers, import competition, interlocking boards of directors, and extraterritorial application of U.S. antitrust law.

The committee plans to hold a hearing on each bill in the near future. Today we begin with a discussion of antitrust remedies. I note that Senator Metzenbaum has also introduced a bill dealing with remedies and mergers, and our discussions will cover those proposals as well.

From time to time in the progress of our economy, it is appropriate to reexamine our antitrust and competition policies to ensure that they encourage instead of discourage competition. In my view, this is one of those times.

For several years, I have been interested in reforming our system of private antitrust remedies to make sure that we maximize both obedience to the law and equity for all concerned parties.

Proposals to reform antitrust remedies have been considered by this committee for a number of Congresses, and in 1982 the committee favorably reported a measure to adjust the system of private damage distribution. Since 1982, the dialog on damages has continued and broadened in academic and business circles. One notable sample of this dialog is the Georgetown University study of treble damages that took place in November, and we have three participants in that project as witnesses today.

Now, of course, we have the administration's legislative proposals on treble damages. In offering these proposals, the administration has suggested that mandatory treble damages and the allocation of those damages discourage competition under some circumstances and result in unfairness to businesses. I am glad to begin serious exploration of these reforms, and I look forward to very useful hearings, which I hope will culminate in sensible antitrust reform.

We have a most distinguished group of witnesses to assist us in our consideration of these proposals. They bring a wealth of experience and insight to our hearings, and we are pleased to welcome them.

On behalf of the administration is Mr. Douglas Ginsburg, the former Harvard law professor who now heads the Antitrust Division.

Following Mr. Ginsburg, we will have a panel of commentators. They are: Mr. Donald Turner, head of the Antitrust Division from 1965 to 1968, coauthor of the principal treatise on antitrust law, and currently practicing at Wilmer, Cutler & Pickering here in Washington; Mr. Charles B. Renfrew, formerly a Federal district judge and then Deputy Attorney General of the United States from 1980 to 1981, and currently general counsel of the Chevron Oil Corp.; Prof. Steven Salop, formerly Assistant Director of Economics at the Federal Trade Commission, now professor of law and economics at Georgetown Law Center, and a designer of the Georgetown project on treble damages, and Robert Abrams, the attorney general of the State of New York, on behalf of the National Association of Attorneys General.

I want to say I welcome you all, and we will begin with Mr. Ginsburg.

Before you start, however, Senator Metzenbaum may have an opening statement and I will call upon him.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. Thank you, Mr. Chairman.

Mr. Chairman, I look forward to the upcoming series of hearings on the subject of legislation to reform the antitrust laws. I also appreciate your including the bill I have introduced, S. 2022, as a subject of these hearings.

Let us start with a basic fact. This administration has contempt for our antitrust laws. We have had a Secretary of Commerce flatly call for the elimination of the key portion of the law barring anticompetitive mergers. We have had an antitrust chief who openly derided leading U.S. Supreme Court antitrust decisions. We have had the law and order Justice Department and an anticonsumer Federal Trade Commission simply ignore those parts of the antitrust laws that do not conform to their arbitrary and untested economic theories.

An administration supposedly committed to free enterprise has encouraged an era of megamergers. It is no surprise that the largest 16 mergers in U.S. history have occurred during the Reagan years.

Even big business realizes now that many of these deals have been disasters for consumers, for workers, and for the shareholders, not to mention our international competitiveness.

The ultimate irony, of course, is that this freewheeling corporate dealmaking has stifled the free enterprise system, not buttressed it.

Now we have a package of antitrust proposals that, taken together, represent a major assault on 70 years of antitrust policy. If these proposals are enacted—and I will do all I can to prevent that—I believe that we will end up with the worst of all worlds: Consumers will be paying higher prices to companies falling farther and farther behind in the race to remain competitive in international markets.

Let us face it: These bills are anticonsumer; they are antismall business, and yes, they are antifree enterprise.

I want to briefly comment on some of the specific proposals before us today. The proposals to raise the standard for illegal mergers and to reduce drastically the treble damage remedy would seriously undermine the current antitrust framework. The idea that we can eliminate the trade deficit by promoting mergers is totally unfounded. I will go further and say it is totally absurd.

A recent Federal Trade Commission report said this approach would make American firms less competitive internationally, not more. Even William Baxter, whom I have publicly described previously as being probably the least effective and worst Antitrust Division head in the history of our country, even he called the idea atrocious.

The administration would like to point the blame for the record trade deficits at anything besides its own disastrous trade policies. Antitrust is a convenient whipping boy. The fact is that antitrust has nothing to do with the trade deficit. The deficit has exploded to record levels during a period when the antitrust laws have not been enforced. The law now provides a sound and flexible standard for evaluating mergers. If there is any doubt over whether foreign competition and possible cost reductions can be considered under current law, then we can clarify that they can be. I have introduced legislation to do just that.

I understand we will discuss today only the issue of antitrust remedies. Consequently, I will defer questions about other aspects of the administration proposals. Since we are discussing remedies today, I would also like to point out in particular the absurdity in remedies available under present law.

Under current law, if all the manufacturers of automobiles in this country agree to fix prices, the only ones who can sue are the dealers. If food manufacturers conspire to raise prices, only grocers could sue. Consumers would be out of luck, even though they would clearly bear the brunt of any such conspiracy. I have included a provision in my bill to correct this situation. The administration has not.

I would hope that as we review these antitrust proposals, the administration could see fit to devote some of the energy it uses to attack the antitrust laws to consider how they could be strengthened in some areas. Providing better remedies for consumers would be one place to start.

Mr. Chairman, I want to say to you openly and publicly that in the past, you and I have seen fit on two occasions where we have worked out compromise legislation that in my opinion, and I think yours as well, was in the best interest of the Nation. It is my opinion that no antitrust legislation is going to pass this year with the busy agenda we have before us unless you and I can again come to some way of compromising some of the issues and coming forward with a positive package, providing not only for better remedies, but perhaps to give some consideration to foreign competition, and whatever other aspects need to be given our attention.

I doubt very much that there is any area of compromise with respect to the matter of reducing treble damages. But absent that, I have the feeling that the agenda of the U.S. Senate is not going to make it possible to pass any antitrust legislation. But my door is open to work with you as I have in the past on two occasions, where we indeed were successful in passing two major pieces of legislation that bore both your name and mine.

The **Chairman**. Thank you, Senator. I hope all Senators will keep an open mind on these matters and not approach these matters with the view that only one position is satisfactory.

I want to assure you that if your bill has the majority support of this committee, there will be no effort to hold it up. If you and I disagree, I hope there will be no effort on your part to hold up the legislation, either.

I wish to place copies of S. 2022 and S. 2162 in the record at this point.

[Texts of S. 2022 and S. 2162 follow:]

II

99TH CONGRESS
2D SESSION

S. 2022

To amend the Clayton Act regarding antitrust enforcement.

IN THE SENATE OF THE UNITED STATES

JANUARY 27, 1986

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Clayton Act regarding antitrust enforcement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Improvement Act of 1986".

REDRESS FOR CONSUMERS

SEC. 2. (a) Section 4C(a) of the Clayton Act is amended—

(1) in paragraph (1), by striking out "Any" and inserting in lieu thereof "The Attorney General, the Federal Trade Commission, or any";

(2) in paragraph (1), by striking out "such State," each place it appears and inserting in lieu thereof "the United States or such State, as appropriate,";

(3) in paragraph (1), by inserting before the period at the end of the first sentence ", including injury resulting from indirect purchases";

(4) in paragraph (2), by inserting "United States, or the" before "State";

(5) in paragraph (2), by striking out "including" and inserting in lieu thereof "and in the case of a State,"; and

(6) in paragraph (2), by adding at the end thereof the following: "The court, in its discretion, may order the distribution of the award in a manner that is just and equitable to those persons or the class of persons on whose behalf the action was brought.".

(b) Section 4C(b) of the Clayton Act is amended—

(1) in paragraph (1) by inserting "Attorney General, the Federal Trade Commission, or the" before "State";

(2) in paragraph (1) by inserting ", as appropriate," after "general"; and

(3) in paragraph (2) by striking out "State claim" and inserting in lieu thereof "claim of the United States or the State".

(c) Section 4C(d) of the Clayton Act is amended by inserting "Attorney General, the Federal Trade Commission, or the" before "State".

(d) Section 4C of the Clayton Act is amended by adding at the end thereof the following:

"(e)(1) If the Attorney General, the Federal Trade Commission, or a State attorney general asserts a claim for damages based on indirect purchases pursuant to subsection (a)(1), the defendant shall be entitled to allege, as a partial or complete defense to a claim by a direct purchaser based on the same or substantially the same alleged conduct, that some or all of what would otherwise constitute direct purchaser's damages were passed on by the direct purchaser to persons on whose behalf the claim for damages from indirect purchases was brought.

"(2)(A) Any person entitled to maintain an action pursuant to subsection (a)(1), alleging injury from indirect purchases, may intervene in any action under section 4 alleging injury from direct purchases based on the same or substantially the same alleged conduct, if a request for such intervention is made within six months after the date of the filing of the initial action. The failure to request intervention in a pending action by any person alleging injury from indirect purchases, within such time, shall constitute a bar to a claim by such person for injury from indirect purchases based on the same or substantially the same alleged conduct.

"(B) Any person initiating an action under section 4 may intervene in any action under subsection (a)(1) which alleges injury from indirect purchases based on the same or substantially the same alleged conduct.

"(C) Upon a request made by the defendant, the court shall order the consolidation of any pending actions pursuant to subsection (a)(1) alleging injury from indirect purchases and any other action under section 4 based on the same or substantially the same alleged contract, combination, or conspiracy.

"(3) Upon the initiation of any action pursuant to subsection (a)(1) alleging injury from indirect purchases, the Attorney General, the Federal Trade Commission, or State attorney general, as the case may be, shall provide reasonable public notice of the allegations of the suit and, to the extent possible, a general description of any direct purchasers who may be entitled to maintain an action under section 4.".

DAMAGES FOR INJURY TO THE UNITED STATES

SEC. 3. Section 4A of the Clayton Act is amended by striking out "actual" and inserting in lieu thereof "threefold the".

DIVESTITURES

SEC. 4. The Clayton Act is amended by adding between section 7A and section 8 the following:

“CONSENT AGREEMENTS AND DECREES AND ORDERS IN ACQUISITIONS

“7B. (a) With respect to any acquisition—

“(1) no Commission consent agreement,

“(2) no consent decree proposed to a court of competent jurisdiction by the Commission or the Attorney General, and

“(3) no order issued by either the Commission or a court

which provides for the divestiture of any part of the assets of a party to such acquisition shall become final before the required divestiture has been approved by the Commission or the court. If the divestiture required by a consent agreement, consent decree, or order is not approved, such agreement, decree, or order may be rescinded by the Commission or court and the Commission or the Attorney General may petition the court for further relief or, if appropriate, initiate an action or proceeding to consider the legality of the acquisition and the need for further relief.

“(b) The provisions of consent decrees proposed by the Attorney General or the Commission and consent agreements proposed by the Commission shall be enforceable, consistent with the terms of the agreement or proposed decree, after agreement by the persons subject to the provisions of the consent decree or agreement, in accordance with procedures authorized by law for enforcement of final orders and decrees.

"(c) No divestiture shall be deemed an acceptable remedy for an acquisition which substantially lessens competition unless the divestiture fully restores competition lost as a result of the acquisition and there is a substantial likelihood that any buyer of divested assets will be a viable competitor for the foreseeable future. In approving divestitures, the Attorney General, the Federal Trade Commission, or the court, as appropriate, shall insure that reasonable steps are taken to protect the interests of affected employees and to preserve employment consistent with the full restoration of competition.".

COST REDUCTION AND IMPROVING COMPETITION

SEC. 5. (a) The Federal Trade Commission and the Attorney General shall, pursuant to section 7A(d) of the Clayton Act, promulgate rules within 180 days after the date of enactment of this Act, specifying information to be provided by persons, subject to subsection (a) of section 7A of such Act, who claim that an acquisition of securities or assets or a joint venture will reduce the costs of operation and thereby promote competition. Such information shall be limited to specific reductions in the costs of production, distribution, transportation, or, in exceptional cases, other factors directly related to firm operations. The Federal Trade Commission and the Attorney General shall take into account such information in determining whether to initiate an action under any of the antitrust laws or the Federal Trade Commission Act.

(b) In any case in which the Federal Trade Commission or the Attorney General declines to initiate an action regarding an acquisition or joint venture on the grounds that the acquisition or joint venture is likely to promote competition through reducing costs, the agency primarily responsible for the antitrust review shall certify that the parties have demonstrated by clear and convincing evidence that—

(1) costs of operation are likely to be substantially reduced directly as a result of the proposed acquisition or joint venture,

(2) the cost reduction is likely to lead to reduced prices, and promote competition, and

(3) there is no reasonable alternative method for achieving such cost reductions other than the proposed acquisition or joint venture.

(c) In the event such a certification is made, it may be offered by any party to any action under the antitrust laws or the Federal Trade Commission Act alleging that the acquisition or joint venture violates such laws and shall be relevant in determining whether the acquisition or joint venture may substantially lessen competition.

FOREIGN COMPETITION

SEC. 6. The Clayton Act is amended by adding between section 7B, as added by this Act, and section 8, the following:

"FOREIGN COMPETITION

"Foreign competition shall be considered in determining whether an acquisition or joint venture may substantially lessen competition to the extent that—

"(1) there is a substantial likelihood that foreign sales in the United States will increase significantly in response to a reduction in competition resulting from the acquisition or joint venture, and

"(2) such increase will substantially offset any harm from such reduction.".

TIME FOR REVIEW OF MERGERS

SEC. 7. (a) Section 7A(b)(1)(B) of the Clayton Act is amended by striking out "(or in the case of a cash tender offer, the fifteenth day)".

(b) Section 7A(e) of the Clayton Act is amended—

(1) by striking out "(or in the case of a cash tender offer, the 15-day waiting period)" each place it appears,

(2) in paragraph (2) by striking out "(or in the case of a cash tender offer, 10 days)", and

(3) by adding at the end thereof the following new paragraph:

"(3) If, as a result of an acquisition to which subsection (a) applies the acquiring person would hold an aggregate total amount of the voting securities or assets of the acquired person in excess of $1,000,000,000 in value, the additional waiting period provided in paragraph (2) of this subsection shall be 60 days.".

INFORMATION TO STATE ATTORNEYS GENERAL

SEC. 8. Section 7A(h) of the Clayton Act is amended by inserting before the period at the end thereof the following: ", or to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information or documentary material will be maintained in confidence. The maintenance of confidence requirement does not preclude any use of such information or documentary material for official law enforcement purposes, including the preparation of comments regarding consent agreements or decrees proposed by the Commission or the Attorney General under any of the antitrust laws or the Federal Trade Commission Act".

PRIVATE REMEDIES

SEC. 9. Section 16 of the Clayton Act is amended by adding at the end thereof the following: "Injunctive relief under this section may include equitable remedies of dissolution, rescission, partial divestiture, and related equitable remedies.".

INTEREST ON DAMAGE AWARDS

SEC. 10. (a) Section 4(a) of the Clayton Act is amended by—

(1) inserting after "sustained,", in the first sentence, the following: "simple interest on the actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws or the Federal Trade Commission Act and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust under the circumstances,"; and

(2) striking out, beginning with "The court may" in the second sentence, all that follows through the end of such subsection.

(b) Section 4A of the Clayton Act is amended by—

(1) inserting after "sustained," in the first sentence, the following: ", simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust under the circumstances,"; and

(2) striking out, beginning with "The court may" in the second sentence, all that follows through the end of such section.

(c) Section 4C(a)(2) of the Clayton Act is amended by—

(1) inserting after "this subsection," the following: "simple interest on the total damage for the period beginning on the date of service of the pleading of the United States or the State setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust under the circumstances,"; and

(2) striking out, beginning with "The court may" in the second sentence, and all that follows through the end of such subsection.

II

99TH CONGRESS
2D SESSION

S. 2162

To promote and improve efficient and effective enforcement of the antitrust laws.

IN THE SENATE OF THE UNITED STATES

MARCH 7 (legislative day, FEBRUARY 24), 1986

Mr. THURMOND (for himself, Mr. LAXALT, Mr. HATCH, Mr. EAST, Mr. MCCONNELL, and Mr. MURKOWSKI) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To promote and improve efficient and effective enforcement of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Remedies Improvements Act of 1986".

TITLE II—TREBLE DAMAGE REFORM

SEC. 201. Subsection (a) of section 4 of the Clayton Act (15 U.S.C. 15(a)) is amended to read as follows:

"(a) Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by him sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate such person for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee: *Provided*, That except as provided in subsection (b), damages sustained by reason of such person having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further*, That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the injured person promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

SEC. 202. Section 4A of the Clayton Act (15 U.S.C. 15a) is amended to read as follows:

"SEC. 4A. Whenever the United States is injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate the United States for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit: *Provided*, That damages sustained by reason of the United States having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further*, That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the United States promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

SEC. 203. Paragraph (a)(2) of section 4C of the Clayton Act (15 U.S.C. 15c(a)(2)) is amended by striking the second sentence and inserting in lieu thereof the following: "The court may award under this paragraph, pursuant to a motion by such State promptly made, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to compensate natural persons in such State for the injury sustained, on such total damage for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, if the court finds that the award of all or part of such interest is just in the circumstances.".

TITLE III—DEFENDANTS' ATTORNEYS' FEES

SEC. 301. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding after subsection (c) the following new subsection:

"(d) In any action under this section, the court shall award the cost of suit, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.".

SEC. 302. Section 16 of the Clayton Act (15 U.S.C. 26) is amended by adding at the end thereof the following: "In any action under this section in which the defendant substantially prevails, the court shall award to such defendant the cost of suit, including a reasonable attorney's fee, upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.".

TITLE IV—CLAIM REDUCTION

SEC. 401. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 4H the following new section:

"SEC. 4I. (a) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (1) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such actual damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.

"(b) For purposes of subsection (a):

"(1) Where the claim is based upon a contract, combination, or conspiracy among competitors and damages are sustained by reason of overcharges or underpayments resulting from such contract, combination, or conspiracy, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments in the market affected, unless the court determines that a more equitable result would be achieved by allocating damages according to paragraph (b)(2).

"(2) With respect to all other claims, damages shall be allocated on the basis of relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages according to paragraph (b)(1).

"(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws.".

TITLE V—EFFECTIVE DATE

SEC. 501. The provisions of this Act shall apply to all actions commenced after the date of enactment of this Act.

The CHAIRMAN. Now, we will be glad to hear from you, Mr. Ginsburg. We are glad to have you here.

STATEMENT OF HON. DOUGLAS H. GINSBURG, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. GINSBURG. Thank you, Senator. I am very pleased to be here, and I particularly want to thank the chairman for scheduling this hearing at an early date so that we can begin the process of your consideration of the administration's package as soon as possible.

The antitrust laws, we believe, are greatly in need of reform. We are approaching the 100th anniversary of the enactment of the Sherman Act, and it is, I think, impossible to maintain that there is no need for some updating of the Sherman and Clayton Acts to reflect current conditions.

When the Sherman Act was enacted by the Congress in 1890, it was an era of trusts—the nail trust, the meat trust, the money trust. The greatest of all was probably the oil trust. And I know that no one here could remember from personal experience, but I am sure you know from your study of the subject that the product monopolized by the Standard Oil Trust starting in the 1870's, was illuminating oil for lamps. That was the origin of our antitrust laws and the nature of the economy that gave rise to them.

Now, there is no less need for competition and a firm competition policy today than there was then. But there is a great need for a change in the way we go about assuring that competition is preserved for the benefit of consumers.

The administration has studied these issues over the last 6 months. The committee has deliberated on many of these issues over the last 6 years. And, in our view, the time has now come for considered action to bring the antitrust laws up to date in advance of their centennial birthday.

Now, the remedies proposals that are contained in the administration's bill, Mr. Chairman—the bill that you have submitted for us—deal with three general topics: Reform of the treble damage remedy, the problem of abusive settlement practices, and the awarding to defendants of their attorneys' fees in baseless cases that should not have been brought in the first place. I will deal very briefly with each of these.

In the matter of reforming the treble damage remedy, first it seems to me utterly apparent that when the U.S. Government is a victim of antitrust violations, it must be entitled, like every other plaintiff, to treble damages, and that is not the case today. When the United States was given a right of action in 1955, it was given a right only to recover its actual damages, and the result is that today, the Federal Government is the victim of choice for an antitrust violator. The worst that can happen is disgorgement of the overcharges and the remote possibility that a criminal jail sentence may be imposed—and I say, "remote" because it is very difficult to get courts to actually incarcerate antitrust violators. That situation needs to be reformed, and until it is, taxpayers will continue to be victimized.

We have 23 grand juries conducting investigations into price fixing against the Federal Government right now around the country, and we expect that we will be bringing forward criminal cases in many of those investigations. It is a situation that is not going to go away until the Congress acts to give the United States an adequate remedy.

Second, the fact is that treble damages are not appropriate in every case. Under today's law, trebling is mandatory regardless of the nature of the antitrust case in question, whether it is a per se violation or a rule of reason violation; whether there are considerable procompetitive aspects as well as overlaying anticompetitive aspects; whether the action involves a conspiracy or unilateral action; whether the conduct occurred in the open as a business practice that the firm thought was lawful; whether it was on the advice of counsel—all of that is irrelevant, damages are trebled. This is a punitive damage regime that is applied indiscriminately regardless of whether there is a moral or an economic basis for punishment rather than simply compensation to those who are injured by the activity. It seems to us that that is an indefensible application of punitive damages, and the result is that, in many situations, competition is inhibited by those who fear that they might in fact be saddled with treble damage liability.

Who would fear that most? Small business, I would think, those who can bear least the risk of that kind of ruinous liability if, some years down the road, it turns out after litigation that they were wrong in their assessment.

Bear in mind that a practice can violate the antitrust laws because its effect is anticompetitive, regardless of its intent. And so an activity which is entered into with a perfectly legitimate procompetitive intent, if it has an anticompetitive effect which cannot be determined until the practice has been put into place, can result in liability for the firm that is willing to take that risk.

The solution is to identify those situations, and to make certain that, where there is a violation, those who have been harmed get full compensation for their harm. That means their actual damages and all of the interest from the time they are injured until the time they are repaid by the defendant.

Punitive damages are essential in certain types of cases. I have already mentioned those brought by the United States. But there are many other private price-fixing cases, market-division cases, bid-rigging cases, all of the cases in which the activity in question is without any redeeming economic value. There is no need to fear that we might overdeter such activity, but there is need to be certain that plaintiffs have an adequate incentive to bring such cases and to bring the full brunt of punitive damage deterrence to bear on those who would violate the antitrust laws.

That is the focus of our enforcement program in the Department of Justice, but we cannot do it alone. We need the aid of private attorneys general and State attorneys general in this effort.

The Chairman. Excuse me, Mr. Ginsburg. I have got to go and open the Senate, and I will be back in a few minutes. Senator Metzenbaum will preside until I return.

Mr. GINSBURG. Mr. Chairman, if I can introduce just the barest of statistics in this regard, I would point out that during this administration, we have gotten criminal convictions of 452 corporations and 327 individuals for violating the antitrust laws; that is 779 violations. We have got 10 almost $107 million in criminal fines imposed against those violators; and we have got 10 about 65 years' worth of jail time for the 180 of them who have gone to jail.

But we cannot do it entirely ourselves, there is no way and there is no budget in the world that would enable the Federal Government to police adequately against this kind of activity.

Senator METZENBAUM [presiding]. Are most of those figures having to do with highway construction contracts? Is that where you brought most of your cases?

Mr. GINSBURG. I do not think that most of them do, but certainly, the largest sectors in which we have gotten convictions have involved road construction, airport construction, electrical contracting, retail gasoline price-fixing conspiracies, and a few other industries to a lesser degree.

That is quite simply because when we crack one conspiracy, we will often turn a witness who will give us information about another conspiracy in perhaps an adjacent geographical area. And the nature of white-collar crime investigation is that one thing leads to another within an industry.

The second aspect of our proposal, Mr. Chairman, is that dealing with abusive settlement practices. This is an issue that is well known to the committee and has been studied within the committee since 1979; and indeed, the committee has twice reported out legislation on a bipartisan basis. And the committee's work has created the record on which we have been able to make our recommendations. The committee's work has clearly shown that there is a real problem. It is known well to all of us as the "whipsaw effect" in antitrust settlements. That is a problem that cries out for solution, but that is really the crux and the only problem that we need to be worried about in this heading.

And as you know, when a single defendant settles for a fraction of its potential liability in a conspiracy case, it shifts a disproportionate amount of liability to those who do not want to settle, but who cannot risk going to trial. The fact is that these parties are forced to settle even if they think they are innocent, and they are effectively denied their opportunity for a day in court because they risk ruinous liability if the court disagrees with them on the merits of their defense.

Finally, we would deal with the problem of defendants' attorneys' fees in baseless cases. The National Cooperative Research Act of 1984, which originated in this committee, established a standard that was designed to discourage truly baseless litigation without in the least inhibiting suits that have any merit whatsoever. Even a baseless suit can drag on for years, while the defendant's attorneys' fees are mounting up. This, too, creates an opportunity for extortionate settlements, and this situation, too, would be reformed without any loss of competition and only a gain for consumers.

Mr. Chairman, I have a longer statement which I would like to submit for the record with your permission, and I would be happy to answer your questions.

Senator **Metzenbaum**. Without objection, your entire statement will be included in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF DOUGLAS H. GINSBURG

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before the Committee to testify on S. 2162, the "Antitrust Remedies Improvements Act of 1986." This bill, introduced by the Chairman on behalf of the Administration, would make a number of timely and important improvements in the key antitrust remedial provisions in the Clayton Act. S. 2162 is one of four pending Administration proposals for improvements in the antitrust laws themselves; the fifth of the Administration's proposals involves amendments to the Trade Act regarding the application of the antitrust laws in industries injured by imports. I want to express our thanks to the Committee for scheduling its hearings on this first bill so quickly. I look forward to discussing the Administration's other proposals with the Committee as soon as its schedule permits.

As its title suggests, S. 2162 deals not with substantive antitrust law, but rather with the equally important issue of appropriate antitrust remedies. Businessmen and women, lawyers, economists, and of course the Members of this Committee well know the significance of remedies in antitrust or indeed any legal system. Substantive law says how people should behave; but applicable remedies determine how they will behave.

We have three kinds of antitrust remedies. Criminal prosecution is designed solely to punish and deter intentional violations. Since about 1960, and particularly in the last 10 years or so, the indictment and incarceration of individuals responsible for hard-core antitrust violations has played an extremely important remedial role in antitrust. The Department of Justice intends to see this role increased even more. We also have preventive antitrust remedies: either the federal government or a private party threatened with antitrust injury may seek to enjoin a violation before it occurs. Finally, we have compensatory remedies: private parties, the federal government, and state attorneys general as parens patriae all may sue to recover monetary damages for injuries caused by antitrust violations. All of these remedies act together to influence the behavior of those who may be accused of antitrust violations as well as those who may be doing the accusing.

Such a panoply of remedies is by no means unique to antitrust. Antitrust is somewhat unusual, however, in that significant punitive, deterrent aspects were deliberately added to its basic compensatory remedies. With a few, recently-enacted exceptions, antitrust damages are always trebled, and plaintiffs automatically are awarded attorneys' fees if they prevail. These punitive features simultaneously give potential plaintiffs strong positive incentives, and potential defendants strong negative incentives, that ordinary compensatory remedies do not. In short, we ask our compensatory antitrust remedies to do a lot of things at the same time, and each of them--compensation, punishment, and deterrence--must be done correctly. After 90 years, there is good reason to believe that some adjustments are necessary.

For some time now, and increasingly in the past few years, the antitrust community generally and this Committee in particular have been studying and working with the antitrust damage remedies to see that they continue to provide fair compensation, deter potential defendants from doing what ought to be deterred, and give potential plaintiffs appropriate incentives to challenge what ought to be challenged. The Committee has recognized that not all antitrust violations are clear, and that the punitive aspects of our damage remedies can deter beneficial as well as anticompetitive activities. The

Committee also has noted that the private interests of potential plaintiffs do not always coincide with those of the public, and that punitive damages can sometimes give plaintiffs an incentive to challenge procompetitive behavior.

Three times in the last four years, the Committee and the Congress have responded to these concerns by adjusting antitrust damage rules for specific types of cases. The Export Trading Company Act of 1982, the National Cooperative Research Act of 1984, and the Local Government Antitrust Act of 1984 all recognized the continuing care that must be taken with a compensatory remedy that also performs a punitive, deterrent function, and accordingly in all three statutes Congress detrebled, or in one instance eliminated, antitrust damage recoveries. The Committee also has developed an extensive record on the need to modify the rules that determine the manner in which joint and several liability for antitrust damages is apportioned among the responsible parties. S. 2162 is in very substantial part a product of this experience.

S. 2162 makes several adjustments to antitrust remedies, each closely related to the others. All are intended to function together to preserve and indeed enhance a strong deterrent effect on unambiguously harmful conduct while removing undue inhibitions on potentially procompetitive activities. All continue to give potential antitrust plaintiffs appropriate incentives to challenge anticompetitive activities, while discouraging plaintiffs from using antitrust damage remedies to restrain competition.

First, S. 2162 correlates the trebling of antitrust damages to the type of injury caused by an antitrust violation. Under the bill, private plaintiffs, state attorneys general suing on behalf of consumers, and for the first time the United States as civil plaintiff, could all recover treble damages for injuries due to overcharges or underpayments by an antitrust violator. Plaintiffs seeking to recover their profits lost as the result of an antitrust violation would be entitled to actual damages plus, for the first time, prejudgment interest on their actual damages from the date of the injury. All successful plaintiffs, of course, would continue to recover their costs, including reasonable attorneys' fees.

Second, S. 2162 provides a right of claim reduction, to counter "whipsaw" settlement tactics that can be used to undermine the just resolution of antitrust cases. Today, a plaintiff's trebled claim against non-settling defendants is reduced only by the actual amount it receives from any settling defendants. This bill would reduce the plaintiff's recovery by at least the share of its damages fairly allocable to each person that the plaintiff releases from liability. The formula for determining a fair share would be based either on sales, as in the typical price fixing case, or on relative responsibility and benefit in other cases.

Finally, S. 2162 would provide costs and attorneys' fees to prevailing defendants where private plaintiffs' conduct was "frivolous, unreasonable, without foundation, or in bad faith." With the Committee's permission, I would like briefly to outline each of these features of S. 2162.

Treble Damages and Prejudgment Interest

The treble damage remedy is an important element in antitrust enforcement. Public resources alone are not sufficient to detect and prosecute all violations. Private treble damage actions have served to help deter and redress antitrust violations since the Sherman Act was passed in 1890.

S. 2162 would preserve, and in fact enhance, the effectiveness of this important remedy. Antitrust violators that harm consumers by raising the cost of goods and services would continue to face automatic treble damage liability. For the first time, such violators would also risk treble damage actions when the United States is the victim of their violations. Such clearly anticompetitive conduct as price fixing and bid rigging for government contracts is costing the taxpayers dearly. We have more than 20 grand juries investigating such situations right now. But so long as the United States is unable to recover punitive treble damages, we cannot hope to protect the taxpayers adequately. The need for a stronger deterrent to such practices is clear.

S. 2162 would also recognize, however, that treble damages can deter a wide range of conduct that is not clearly anticompetitive and that may be quite beneficial to consumers and to our economy generally. The current punitive damage provisions apply uniformly to all types of practices that may, in particular circumstances, be found to violate the antitrust laws--no matter how close the question. In so doing, they have to actually inhibit some procompetitive activities. In selectively "detrebling" damages assessed against activities that are often procompetitive, S. 2162 reflects that fact that it simply makes no legal or economic sense for a punitive remedy designed strongly to deter clearly harmful conduct like price fixing to be applied equally to ordinary, open business activities that, after a full trial on their economic effects, may or may not be found to have been anticompetitive.

The logical shortcomings of the current treble damage rule have long been recognized. Congress has considered proposals to limit the application of treble damages since at least the 1950's, when a bill was introduced to make multiple damages discretionary. In recent years, calls for one partial reform or another have been constant.

Congress has in fact now twice limited antitrust damage recovery to full compensation--actual damages plus prejudgment interest--for certain categories of conduct found to hold substantial procompetitive promise. The Export Trading Company Act of 1982 responded to concerns that treble damage liability and uncertainty over the application of the antitrust laws to export activities were combining to constrain American export trade. The National Cooperative Research Act of 1984 reflected the same concerns as they relate to joint research and development. This Committee found that the threat of private litigation and the uncertain legal status of joint R&D efforts "may have caused many firms to abandon their plans for such efforts at the drawing board, even when the activities under consideration posed little or no actual threat to competition." 1/

The Local Government Antitrust Act of 1984 eliminated damage recovery altogether in antitrust suits challenging activity by local government entities. Once again, this Committee found that "[t]he threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services." 2/

Other proposals to modify the rule of automatic treble damages in particular antitrust actions continue to be made.

1/ Report of the Senate Committee on the Judiciary to Accompany S. 1841, S. Rep. No. 427, 98th Cong., 2d Sess. 3 (1984).

2/ Report of the Senate Committee on the Judiciary To Accompany S.1578, S. Rep. No. 593, 98th Cong., 2d Sess. 3 (1984).

Bills are presently being considered to detreble damages in cases challenging conduct involving trade or commerce with a foreign nation, and in cases that concern the licensing of intellectual property.

The Administration believes that it is time to take what we have learned from the extensive and lengthy debate over the treble damage remedy and address the problem on a broader basis. Years of court decisions, scholarly comment, commissions to study the antitrust laws, Congressional hearings, and limited revisions of the law have provided the experience and guidance to fit the remedy to its proper task.

We believe that the primary goals in reforming the treble damage remedy should be to maintain the strongest incentive for plaintiffs to sue defendants who engaged in patently anticompetitive conduct, thereby punishing and deterring such conduct, and to provide a fully compensatory remedy for conduct which may or may not be anticompetitive under the circumstances, so as not to allow the threat of punitive damages to inhibit innovative competitive activity. These goals can be sought in several ways; indeed, a number of alternative approaches have been suggested. While there is no absolutely perfect approach, S. 2162 provides what we think is clearly the best way in which to define the proper scope for punitive damages in antitrust. Under S. 2162, treble damages will continue to be recoverable for injuries in the form of overcharges or underpayments by an antitrust violator. Other antitrust injuries--the plaintiff's lost business profits--will be redressed by actual damages plus prejudgment interest, unless the award of all or part of such interest is unjust in the circumstances. We believe that this approach has a number of significant advantages.

S. 2162 properly places the weight of the punitive damage remedy on clearly harmful conduct. Covert concerted practices such as price fixing, bid rigging, divisions of markets, and allocation of customers must be strongly deterred. Suits brought by victims of these practices, often consumers or small business customers, are generally based on overcharges or underpayments. Injury in the nature of lost profits, however, may result from practices with procompetitive potential. Punitive damages for such practices, usually unconcealed, can stifle innovative, competitively beneficial behavior. A fully compensatory remedy for lost profits will not inhibit vigorous competition.

S. 2162 maintains a strong incentive for plaintiffs to detect and challenge unambiguously anticompetitive behavior but minimizes the incentive to bring suits intended to thwart competition. Persons claiming antitrust injury due to overcharges typically are consumers who are hurt by anticompetitive practices, and who are motivated by a desire to promote competition from which they, as customers, will benefit. Rivals seeking lost profits, however, may be suffering from an inability to compete effectively in the marketplace rather than from any unlawful practice. The law should not provide them with an enhanced ability or incentive to challenge healthy, aggressive competition; by taking the punitive element out of suits by rivals, S. 2162 accomplishes this result. At the same time, it preserves a fully sufficient incentive to competitors who have actually been harmed by an antitrust violation to seek redress: a fully compensatory remedy, which means actual damages and interest thereon from the time they are injured to the time they collect their damages, nothing less. Actual damages alone do not compensate for the lost use of money from the time of injury to the time of judgment.

The issue of prejudgment interest has been studied several times in the last few years. In 1980, Congress enacted a limited right to recover prejudgment interest on the basis of dilatory conduct in treble damage actions. S. 2162 preserves this right in cases in which damages will continue to be trebled. When damages have recently been detrebled in particular contexts, however, it has been recognized that prejudgment interest should be awarded as a matter of course. S. 2162 follows the lead of the National Cooperative Research Act of 1984 in awarding prejudgment interest on actual damages from the date of injury, unless all or part of such interest would be unjust in the circumstances. S. 2162 does differ slightly by giving the court more flexibility in choosing the appropriate interest rate to best reflect a loss over a period of fluctuating rates.

S. 2162 provides certainty and can be implemented easily. The determination of when multiple damages are recoverable turns on an element of proof already required in every case: the plaintiff's damage theory. Alternative proposals to detreble for certain categories of conduct would engender lengthy litigation over the appropriate characterization of the offense charged. Indeed, the number of Supreme Court cases on the question whether particular conduct should be treated as "per se" unlawful or instead subject to the "rule of reason" is a stark reminder of the need for a distinction that is not easily manipulated in order to turn actual damage cases into punitive damage cases. Nor will an enumeration of particular types of violations suitable for one treatment or another prove stable. If counsel can mischaracterize conduct in order to raise the stakes of litigation they will do so: for example, joint purchasing arrangements may be called boycotts or joint selling arrangements price fixing. It is much more difficult, however, to mischaracterize lost profits as overcharges. The pre-litigation relationship between the parties immutably determines the plaintiff's damage theory: if it wasn't a consumer of the relevant product, it could not be overcharged for it. Thus, S. 2162 avoids the potential for abuse that conduct-oriented approaches to detrebling may create.

The remedies provided by S. 2162 are also consistent with optimal penalty theory. Overcharges clearly indicate the societal harm caused by an antitrust violation. Lost profits are not closely related to such harm, however, and in fact may well overstate it. Overcharges also typically result from covert behavior and we can never be certain it is all being detected; treble damages provide a needed multiplier to deter volations that may not otherwise be detected.

Finally, S. 2162 promotes consumer welfare. Provable overcharges reflect the transfer of surplus from buyers to sellers that monopoly permits and competition prevents. When overcharges are proven, trebled, and recovered, we have the greatest confidence that the antitrust laws are being applied in line with their intended function, the preservation of a competitive economy.

Claim Reduction

S.2162 also addresses the issue of how best to distribute the responsibility for damages among the defendants in antitrust litigation in order to reduce perceived unfairness resulting from the current antitrust damage allocation system. The issue of antitrust damage allocation reform is, of course, a familiar one for this Committee. Proposals to amend the present scheme of allocating damage responsibility in antitrust litigation have been before the Committee continuously since

1979. 3/ The Committee has held several sets of hearings on the issue and twice reported legislation that would have provided rights of contribution and claim reduction in antitrust litigation. 4/ Thus, I will keep my remarks on the need for damage allocation reform brief.

Liability for antitrust damages is joint and several, which means that a plaintiff may sue any or all of the members of an antitrust conspiracy and collect its damages in any proportion from liable defendants. Furthermore, when a plaintiff releases a defendant from liability for damages, only the actual amount paid for the release is deducted from the plaintiff's claim against the remaining defendants. Thus, if a plaintiff enters into a settlement with any defendant for an amount that is less than the share of the plaintiff's injury caused by the settling defendant's own conduct, responsibility for the difference is shifted to the remaining defendants. The term "whipsaw settlements" has come to be applied to the deliberate use of early, "sweetheart settlements" to raise the perceived liability of nonsettling defendants to the point where they are forced to abandon even meritorious defenses and settle out of the fear of facing ruinous liability should they litigate and lose.

The extent to which either strategic defendant selection or whipsaw settlements have resulted in unfairness worthy of reform, and what manner of reform would be most appropriate, have been debated at length for the last 7 years. Although legal scholars have failed to reach a consensus on these

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3/ *See* S. 1468, 96th Cong., 1st Sess. (1979); S. 995, 97th Cong., 1st Sess. (1981); S. 380, 98th Cong., 1st Sess. (1983); S. 1300, 99th Cong., 1st Sess. (1985).

4/ S. Rep. No. 428, 96th Cong., 1st. Sess. (1979); S. Rep. No. 359, 97th Cong., 2d Sess. (1982).

questions, 5/ I believe that the exhaustive hearing record that has been developed before this Committee provides a firm basis for congressional action at this time.

After examining the record on antitrust damage allocation, we are convinced that there is a real problem to be solved, namely the use or potential use of whipsaw settlements. Plaintiffs have an obvious incentive to obtain the maximum amount they can in settlements, and the present antitrust damage allocation system encourages this incentive to the point of excess by permitting whipsaw settlements. Antitrust liability rules should encourage fair settlements, but not whipsaw settlements.

Three types of reform legislation in this area have been considered by the Committee: contribution, claim reduction, and the elimination of joint and several treble-damage liability. Contribution, which permits liable defendants who have paid more than their fair shares of the plaintiff's damages to sue other liable defendants who have not, basically deals with perceived unfairness where plaintiffs make arbitrary choices to sue or collect damages from some but not all of those responsible for antitrust injury. On the other hand, claim reduction, which requires automatic deduction from the plaintiff's remaining claim of the fair share of its damages attributable to any person released by the plaintiff from liability, addresses the whipsaw settlement problem itself.

5/ See, e.g., Easterbrook, Landes, and Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980) (costs of contribution and claim reduction probably exceed benefits); Polinsky and Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981) (claim reduction recommended over contribution and over no change in existing law); Sullivan, New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution, 1980 U. Ill. L. F. 389 (contribution should be provided in non-per se cases only on a discretionary, comparative fault basis).

individual treble-damage liability (i.e. the elimination of joint and several liability), eliminates both of these problems--and more.

Over the last few years, the Department of Justice has listened to the debate on these approaches, and studied their relative effects on antitrust damage litigation. Of particular concern to the Department is the relative effect that each alternative would have on deterrence of hard-core criminal behavior, such as price fixing, and on plaintiffs' incentives to discover and bring suit against it. I do not want to take up valuable Committee time covering old ground; just last year the Department presented a detailed statement of its concerns in this area during the Committee's consideration of S. 1300. 6/ I will, however, reiterate our belief that eliminating joint and several liability, and to a lesser extent providing a right of contribution, could reduce deterrence of price fixing and bid rigging by reducing defendants' *ex ante* expectations of liability from engaging in unlawful conduct. Furthermore, complicating the litigation facing plaintiffs could discourage some meritorious suits. Limiting defendants' maximum potential liability by virtually eliminating any risk of paying damages out of proportion to their market shares could allow potential miscreants to more accurately assess the costs of engaging in unlawful conduct. Of all of the proposals, claim reduction appears least likely to have these adverse effects on deterrence.

We also believe that individual treble-damage liability and contribution would increase to a greater extent than claim reduction the burden on the federal courts in resolving antitrust disputes.

6/ Statement of Charles F. Rule, Acting Assistant Attorney General for Antitrust, Before the Senate Comm. on the Judiciary Concerning S. 1300 (July 29, 1985).

To summarize, the Department believes that the record developed through congressional hearings on the antitrust damage allocation system has disclosed a problem with whipsaw settlements, and that claim reduction is an appropriate method for resolving this problem. I urge the Committee favorably to consider the claim reduction proposal in S. 2162.

Attorneys' Fees

Let me turn briefly now to those provisions in S. 2162 that deal with attorneys' fees in private antitrust cases. The bill provides for the award of costs, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff has pursued baseless litigation. This provision addresses concerns that the current imbalance in antitrust law regarding the award of attorneys' fees facilitates the potential abuse of antitrust remedies.

Sections 4 and 16 of the Clayton Act entitle only prevailing plaintiffs to attorneys' fees; in general, prevailing defendants do not receive attorneys' fees. Thus, the antitrust laws embody both the English and American rules on attorneys' fees, but in a manner that discriminates between plaintiffs and defendants.

This statutory imbalance was knowing and deliberate. Private enforcement of the antitrust laws is an important complement to government prosecution. Antitrust cases can be legally or factually complex, and Congress decided to supplement treble damage recovery with the award of attorneys' fees to provide even greater incentives to potential plaintiffs. Unfortunately, the attorneys' fees imbalance also creates a potential for abuse. This abuse may take the form of a "strike suit" filed primarily to extract a settlement from a defendant for something less than the defendant's anticipated litigation costs, or a potentially lengthy injunctive suit by a rival to convince a competitor to abandon its plans to compete aggressively rather than incur substantial legal costs. Such actions undermine the purposes of private enforcement and increase the costs that litigation imposes on society generally.

S. 2162 recognizes the possibility of such abuse by awarding costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith." This standard is most familiar to the Members of this Committee: it is the same standard used by Congress when it recently decided to award attorneys' fees to prevailing defendants in the National Cooperative Research Act of 1984.

Indeed, Congress has on more than one recent occasion recognized and responded to the potential for abuse of the antitrust process by creating the possibility of attorneys' fee awards to prevailing defendants in such circumstances. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 permits recovery of attorneys' fees by a prevailing defendant in a state parens patriae case upon a showing that the suit was brought "in bad faith, vexatiously, wantonly, or for oppressive reasons." 7/ The Export Trading Company Act of 1982 awards attorneys' fees to prevailing defendants as a matter of course. 8/ And as indicated above, in its most recent consideration of this issue in the National Cooperative Research Act, Congress decided to permit recovery of attorneys' fees by a prevailing defendant in cases challenging joint research and development upon a showing that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in

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7/ 15 U.S.C. 15c(d)(2).

8/ 15 U.S.C. 4016(b)(4).

bad faith. 9/ In reporting this standard, based on the Supreme Court's Christiansburg Garment decision, 10/ the NCRA conferees expressed their belief that it would "achieve the desired goal of protecting law-abiding defendants from baseless and bad faith attacks while ensuring that private enforcement of the antitrust laws is not deterred." 11/ We concur in this assessment, and recommend that this carefully drawn provision be made applicable across-the-board in private antitrust cases.

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To summarize, Mr. Chairman, keeping our antitrust remedies true to their purpose as substantive antitrust law evolves and experience accumulates is an extremely important task. Congress has already made some progress along these lines. We believe, however, that the time for an industry-by-industry, or activity-by-activity approach to the treble damage remedy has passed, and that now is the time to make comprehensive, integrated, but by no means radical or unprecedented adjustments to the remedial provisions of the Clayton Act.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions the Committee may have.

9/ 15 U.S.C. 4304(a)(2).

10/ Christiansburg Garment vs. EEOC, 434 U.S. 412 (1978).

11/ H.R. Rep. 98-1044, 98th Cong., 2d Sess. 15 (1984).

Senator **Metzenbaum**. Mr. Ginsburg, as you were talking, one thought went through my mind. It seems to me you gave great emphasis to the question of the U.S. Government having the right to sue for treble damages. As you know, that is also in the legislation that I have introduced.

I think you also recognize that some portions of the administration bill are very controversial.

What would be your attitude, assuming that there was proper sponsorship, of a separate bill giving the Government the right to sue for treble damages, with no amendments to be made thereto—and as you know, we can under certain procedures in the Senate, by unanimous consent, pass legislation of that nature.

I myself think there would be some merit in doing so.

Would you be supportive of such an effort?

Mr. **Ginsburg**. Well, Senator, if I understand you—let me make sure I do understand you—you are talking about a portion of our bill as it stands, but separated from the rest of the bill.

Senator **Metzenbaum**. Which is also a portion of my bill on the subject.

Mr. **Ginsburg**. Yes; I believe that is correct, although I think—perhaps it is in another section—or, it is a different section—where there is a difference in our approaches to prejudgment interest, which we can discuss.

Senator **Metzenbaum**. Well, that is a different issue.

Mr. **Ginsburg**. Yes, that is a different aspect.

Senator **Metzenbaum**. This is a question of the right to sue. The question of interest is a different issue.

Mr. **Ginsburg**. Yes. Well, we have approached this issue of remedies reform as a single issue driven by a single principle, and it ends up having several conclusions, one of which is that the United States should be entitled to treble damages. But I think that conclusion comes from the same source, and we think it has the same source behind it as the other aspects of the bill.

The instinct, Senator, driving this package is very simple. It is, what can we do to make sure that the antitrust laws are as effective as possible in preserving competition and do not have any spillover effect to inhibit competition? And that leads us to all of the conclusions in the bill.

Now, I do not see any reason at this point to think that one aspect of the bill should be given priority over another, but I am not as familiar as you with the Senate's workings, obviously.

Senator **Metzenbaum**. Well, I do not think there is any secret about the fact that you are going to have one hell of a battle to pass your bill in its entirety. We know the battles we have had in the past with respect to the issue of contribution, and I do not see that there will be any different approach. And knowing the floor of the Senate as I do, I think—and I said this in my opening statement—that unless there is some compromise worked out, I think you have got a long way to go.

As you know, the R&D bill was held up for about a year before we finally worked out a package that passed. The Antitrust Improvements Act moved very rapidly once we had come to an agreement on it.

But absent that, I think there is sufficient sentiment on the floor of the Senate that you would have great difficulty with getting this package through.

Now, I made a rather strong case for the right of the administration to bring a treble damage action on its own. So I am saying to you that since one may be a matter that will take 1 year, 2 years, or whatever, and the other might very well become law within a couple of months, because I have some feeling that the House might be equally receptive, if the administration is that anxious to get this right to sue, I would be very happy to explore with the chairman whether or not we could not move a bill of that kind through very, very rapidly.

Mr. GINSBURG. Senator, I appreciate your consideration of that possibility. I think, however, that until we have had a discussion of some of the issues that you anticipate are going to be controversial, I cannot be as confident that they will indeed be divisive.

I am yet to hear, for instance, a coherent argument—a cogent argument, I should say—for the imposition of punitive damages in every antitrust case. And I really think we have a wide area of agreement—indeed, I think that you and I would agree on a few broad principles, such as it cannot possibly be true that punitive damages are appropriate in every antitrust case.

It is true, as you suggested, that efficiencies are relevant to mergers, and so on. And I think until we have discussed those matters and seen whether we really do not have a very common set of goals, it is premature to assume that we will have divisions of opinion.

Senator METZENBAUM. Well, I think we will, but I wanted you to know that this Senator was receptive to giving the Government that right which you are asking for and doing it on a very expeditious basis.

I have some doubts that you and I agree about the importance of effective private antitrust enforcement. Much of the administration bill we are discussing today makes it more difficult for private plaintiffs to bring cases. Do you know how the number of Justice Department cases that have been brought compares with the number of private cases that have been brought?

Mr. GINSBURG. Well, there are somewhat over 1,000 private cases brought each year, as far as we can tell, and the Georgetown data base suggests that the number may be about 1,100.

Senator METZENBAUM. And Government cases?

Mr. GINSBURG. Oh, I think last year there were 60 separate cases.

Senator METZENBAUM. So therefore, isn't private enforcement of the antitrust laws essential to business complying with the law?

Mr. GINSBURG. Yes.

Senator METZENBAUM. The administration bill provides that treble damages are only available for persons, "* * * having been overcharged or underpaid by any person subject to liability under the antitrust law. Now treble damages are available for any violation."

Let me ask you if treble damages would be available in these situations under the administration bill. A small business is driven out of business by a monopolist competitor through unfair tactics.

I am asking you whether under your proposal, that a small business operator would have available to him or her the antitrust remedy.

Mr. GINSBURG. A firm that is driven out by unfair practices, assuming they violate the antitrust laws, whatever the practices were?

Senator METZENBAUM. Well, I think I made it clear that they were driven out of business by a monopolist competitor through unfair tactics. That would certainly violate the law.

Mr. GINSBURG. If there would be antitrust liability, then the firm that you have described would be entitled to its lost profits and interest on them from the time when they were lost—not from the time that the complaint was filed, but from the time that they were lost. In addition, however, purchasers from the monopolist would be the victims of an overcharge and would be entitled to treble damage remedies against the monopolist.

Senator METZENBAUM. Who would be entitled?

Mr. GINSBURG. Purchasers from the monopolist. A monopoly position unlawfully gained is a violation of the antitrust laws.

Senator METZENBAUM. That does not help the small businessperson, does it? He is out of business. All he could get back under your bill would be single damages for his future profits; is that right?

Mr. GINSBURG. He would be entitled to recover his lost profits, as he is today, but not trebled, and interest, as he is not entitled to today, regardless of whether the outcome is more than treble the amount of his actual damages or less than treble.

Now, the reason for that, Senator, is that it is the economically correct approach to compensation. And let me explain how that comes about.

There are two theories of damages in antitrust cases that can be alleged, and one of them is alleged in every antitrust case. It is either that the plaintiff has been overcharged—if we can put aside the parallel undercompensated case for the moment—the plaintiff has been overcharged by reason of the antitrust violation, or the plaintiff has lost profits by reason of the antitrust violation.

Now, in the overcharge case, the plaintiff typically has purchased something from the violator. We are talking therefore about violations that are going to be price fixing, bid rigging, market divisions, horizontal customer allocations, and things of that sort. Such generally concerted activity, which generally is secret activity—is the very kind of thing for which punitive damages, treble damages, are necessary and appropriate.

In the lost profits type of case, the plaintiff is a business entity, and it is alleging that something that the defendant did hurt it in its business. Now, that could be good for consumers or it could be bad for consumers, if the plaintiff has in fact lost profits. The question in the antitrust case is, was it because the defendant did something that was procompetitive or something that was anticompetitive?

Senator METZENBAUM. I said through unfair tactics, a monopolist competitor through unfair tactics.

Mr. GINSBURG. I understand, that in the case that you put, the answer would be, after resolution by the court, that it was through something that was anticompetitive.

The problem is that it is not obvious at the outset what the answer to the question is. You have assumed it. But in real life, that is the issue for trial. And yet the business——

Senator METZENBAUM. You are missing the point of my question. Under your legislative proposal, you would have to either have been overcharged—and the small businessperson has not been overcharged—or underpaid.

Now, the small businessperson has not had any of those things happen to him, and yet he or she would be denied a remedy in the courts under your proposal.

Mr. GINSBURG. No, Senator. He or she would be entitled to recover all of the actual harm they have suffered.

Senator METZENBAUM. Single damages?

Mr. GINSBURG. Yes.

Senator METZENBAUM. Not treble damages?

Mr. GINSBURG. Not treble damages.

Senator METZENBAUM. You would deny that, and therefore the small businessperson who has been driven out by this monopolistic competitor using unfair tactics would obviously not even be in a position to bring an action because by the time they got done with their legal fees and received single damages, they really would not——

Mr. GINSBURG. Well, Senator, that is not so. First of all, receiving back what one has been wrongfully deprived of is the nature of most commercial litigation, and there is no doubt that people find it worthwhile to pursue their remedies even in regimes where there is no trebling going on. That is true in contract actions and most securities actions; the run of commercial litigation does not involve treble damages.

In addition, because we would make interest from the time of injury available to the plaintiff, it is quite possible that the actual amount being sought by the plaintiff would be greater under our approach than is possible under current law.

But Senator, you are focusing on one-half of the picture, and that is what is the impact on the incentive to sue. And you are not focusing on the other half, which is what is the impact on the incentive of potential defendants to engage in lawful and unlawful behavior? We always want to discourage them from engaging in unlawful behavior. The problem today is that when they go to antitrust counsel—and this is most particularly true of small business—when they go to antitrust counsel and ask, "Can I do this? Is there any risk?" the answer has almost got to be, "There is some risk." There is some antitrust risk, and indeed, if we are wrong, if it turns out that it is determined to be anticompetitive, damages will be trebled.

Now, a small business is least likely to be able to undertake that kind of risk. The result is that the antitrust law is having an inhibiting effect on its competitive ability. That is the concern that you want to focus on.

Senator METZENBAUM. On the small businessman's anticompetitive ability? I do not follow that at all.

Mr. GINSBURG. If the risk of his pursuing an innovative way of doing business is great, it is the small business rather than the large that is going to be inhibited from taking that risk, because it could face ruinous liability over a matter of this sort, and the antitrust case reports are littered with the bodies of small as well as large businesses.

Senator METZENBAUM. But there will be more small businesspeople that fall by the wayside if the administration bill is passed, because they will not know that they have the protection of the right to bring a treble damage action.

Mr. GINSBURG. Senator, that really is not an accurate prediction because first of all, we know that small businesses pursue their remedies under laws that do not allow for trebling. If a matter is worth pursuing, the remedy is there and they will pursue it.

The question of punitive damages cannot depend upon the size of the plaintiffs, and I do not think that you are suggesting really that it should, that small plaintiffs should be entitled to punitive damages whereas large plaintiffs should not.

Senator METZENBAUM. No. I suggest the law ought to stay as it is. Let me ask you about a group of realtors that get together to keep a discount broker from having access to multiple listing, and the discount broker winds up going out of business. That discount broker would only have a right to single damages, not treble damages, under your proposal; right?

Mr. GINSBURG. Single damages and the interest on its actual damages. The other brokers, however, would also be exposed to treble damage liability if the result of this activity were that consumers were overcharged. And presumably, that would be the purpose of the activity.

Senator METZENBAUM. Well, it would not necessarily be an overcharge. I am not suggesting an overcharge. I am suggesting that I do not think that because they are charging 7 percent and he is charging 5 percent that they would be able to prove an overcharge in such a case.

Mr. GINSBURG. Well, if they are able to prove it, they are entitled to treble damages.

Senator METZENBAUM. But not the realtor?

Mr. GINSBURG. No. The realtor would be entitled to whatever losses he incurred because of this unlawful activity, plus the interest on that.

Senator METZENBAUM. So one person who bought a home might be able to bring an action for that 2-percent difference; is that right?

Mr. GINSBURG. On behalf of the class of all persons who have bought such a home, yes, or the State attorney general could do that.

Senator METZENBAUM. What about a small telephone company that is trying to compete with AT&T and loses several million dollars because AT&T unfairly deprives them of access to communication lines or other essential services? The same thing—the consumer would have a right, but the small telephone company would have no right?

Mr. GINSBURG. I am trying to imagine the situation, since AT&T does not compete with local telephone companies. But let us assume that in the manufacture of equipment, perhaps, there is competition between AT&T and a smaller firm. I am sorry—the result was that AT&T drove them out of business?

Senator **Metzenbaum**. Yes, the small company gets driven out of business.

Mr. **Ginsburg**. Well, perhaps they are driven out of business because AT&T was more efficient and underpriced them.

Senator **Metzenbaum**. You just put a "perhaps" in that does not exist.

Mr. **Ginsburg**. Yes. Now, let me tell you my story, Senator——

Senator **Metzenbaum**. You made up another factor.

Mr. **Ginsburg**. Senator, let me tell you my story. Let us say that the large firm's prices are lower than the small firm's, and the small firm brings an antitrust suit and alleges predatory pricing.

Now, it may be right, and it may be wrong. And if it is right, it should get its damages, and interest on them. If it is wrong, however, it should not be able to put the defendant to the risk of punitive damages, because it will do so, and it will bring that case and try to stop its competitor from engaging in aggressive low pricing. That is an abuse of the antitrust laws. That is not what we are here for.

Senator **Metzenbaum**. Well, I am saying to you, of course we are not here for abusing the antitrust laws. But by merely using the pejorative term that it is an abuse of antitrust laws does not change the fact that the small telephone company is driven out of business; the small real estate company is driven out of business; a small clothing manufacturer who is put out of business by an agreement to fix retail prices by a clothing manufacturer, and then the small retailer gets cut off because he refuses to abide by that price-fixing arrangement, and the retailer loses $1 million in profits—you would deny that retailer the right to bring an action?

Mr. **Ginsburg**. No, sir. I would give him the right to recover every dollar of actual damages incurred.

Now, the example you give is an interesting one, because about 25 percent of all the private antitrust cases filed each year appear to be cases brought by dealers against their suppliers—sometimes for termination, sometimes for other matters. Dealers very, very rarely win the cases that go to trial. Most of these cases, of course, are settled. According to the Georgetown study, about 88 percent of all antitrust claims are settled without going to trial

In the universe of those that do go to trial, however, the dealer very rarely wins these cases. Now, the fact is that when the dealer brings a case against a manufacturer, it may or may not have a valid claim, but it certainly has the opportunity by bringing that action to inhibit the manufacturer's ability even to do lawful things in the way that it once did.

The Georgetown study also shows that more than 30 percent of cases are brought by one competitor against another, and some of your hypotheticals involve one competitor suing another.

Senator **Metzenbaum**. Small competitors against——

Mr. **Ginsburg**. Well, not necessarily, although on average, plaintiffs are smaller than defendants in antitrust litigation, and the Georgetown study confirms that.

But not necessarily small versus large, and size really is not a terribly important element in this discussion. But when the antitrust laws are being used one-third of the time by competitors suing each other, you have to believe in fairies to think that that is in the interest of consumers in each of those cases.

Some of them are, and some of them vindicate the antitrust interest in preserving competition. But many of them are in the private interest of the competitor to inhibit his rivals from doing the very things that benefit consumers but hurt the plaintiff. And that is an important segment of this world, Senator.

Senator METZENBAUM. I have one last question, and then I see two of my colleagues are here. Tell me what part of your bill would help consumers.

Mr. GINSBURG. Every aspect of this bill is designed to preserve competition, free and open markets, and therefore to benefit consumers. Some of the provisions do it by strengthening the procompetitive aspects and intended purposes of the antitrust laws. Other provisions do it by trying to eliminate the anticompetitive uses to which the antitrust laws have been put by strike suit lawyers and by competitors who can use the antitrust laws to inhibit vigorous competition from others that benefits consumers.

Senator METZENBAUM. Well, I asked you the one question about the clothing manufacturer cutting off the retailer with discount prices, and you indicated that the retailer would have a right to bring an action for the profits it might have made. But the fact is that the consumer is going to get hurt in that kind of a case, and you would permit that to happen. Isn't that so?

Mr. GINSBURG. If the retailer vindicates his interest and gets his actual damages and interest back from the manufacturer, that will protect consumers because it will make sure that there is a remedy for violating the antitrust laws.

Senator METZENBAUM. The retailer will not bring the case. Unless the retailer can get treble damages, he is not in the economic position to bring the case. Let us be realistic.

Mr. GINSBURG. Senator, let us be realistic. If the manufacturer firebombs the retailer's store, he is not entitled to treble damages, but he is entitled to recover his actual harm, and you can be assured that he will do so.

Senator METZENBAUM. Plus punitive damages in that case.

Mr. GINSBURG. Not necessarily, Senator. There is no provision in the law that would make punitive damages automatic in that case. It would depend.

Senator METZENBAUM. I will conclude, but I have other questions for you after my colleagues speak. But I really have difficulty understanding why the administration is so against the American consumer and unwilling to provide the protection that the consumer presently has.

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I have no questions at this point. Thank you.

Senator METZENBAUM. Senator McConnell.

Senator MCCONNELL. Mr. Ginsburg, Chairman Thurmond had several questions he was going to ask you but he had to go and open the Senate, so I will propound a couple of them to you.

Mr. GINSBURG. Certainly.

Senator MCCONNELL. You were involved in the administration's task force that considered alternative proposals for reforming the antitrust remedy systems. Could you describe the alternative proposals considered by the task force and some of the pros and cons of those other approaches?

Mr. GINSBURG. Yes, sir. We looked at virtually all of the existing literature on antitrust remedies, the great majority of which has appeared in the last 15 years. Taking as perhaps the richest example, the question of treble damages, we surveyed proposals that would have allowed for selective detrebling based on whether the violation was a per se violation of the antitrust laws versus a rule of reason case. Another would have allowed discretionary detrebling after trial, depending upon the court's evaluation of the willfulness of the violation. Other proposals would have listed particular types of violations as appropriate for treble damages, or alternatively, for only single damages.

We found difficulties in each of these and all of the other proposals in the existing literature, and that led us to try to start from scratch and see if we could devise a better way of approaching the subject, and that is what gave rise to our overcharge or undercompensate distinction for trebling.

We studied the committee's experience over the last 6 years with respect to the issue of abusive settlement tactics. We looked at the proposals to eliminate joint and several liability, to give a right of contribution, and to allow only for claim reduction, and every combination of those proposals. We determined that the claim reduction proposal was the approach tailored most effectively to the nature of the problem there.

Finally, in the area of defendant's attorney's fees, it did not take long to determine that the formula that this committee determined was appropriate in the Cooperative Research Act of 1984 could not be improved upon and should be expanded throughout the general realm of the antitrust laws. It simply says that a suit that is frivolous, without foundation, unreasonable or in bad faith will result in the plaintiff's liability for the defendant's attorney's fees. And that seems to us to be a rule that can hardly raise an objection.

So we did, Senator, survey the entire area before reaching these recommendations.

The CHAIRMAN. Professor Ginsburg, the administration proposal retains treble damages for injuries in the form of overcharges or underpayments by an antitrust violator, and provides actual damages plus interest for other antitrust injuries. The purpose of this is to ensure that treble damages are available to the victims of the worst kinds of antitrust violations, such as price fixing. However, buyers who can show that they have paid prices above a competitive level can sue for treble damages for any kind of antitrust violation, such as monopolization.

Is that consistent with the purpose of the proposal?

Mr. GINSBURG. Senator, it is consistent with the purpose of the antitrust laws because it makes certain that consumers, by having the treble damage remedy, have the incentive and the ability to finance that litigation that they would not otherwise have. It still leaves a firm that is injured by reason of an antitrust violation with the ability to recover all of its injury plus interest on that injury from the time it occurred. We think that that would be a great advance in terms of consumer protection.

The CHAIRMAN. Your proposal would provide for interest to be awarded on actual damages.

Mr. GINSBURG. Yes, sir.

The CHAIRMAN. Could you explain the reason for not awarding prejudgment on treble damage awards?

Mr. GINSBURG. When the interest is added to the actual damage in a detrebled case, the result will in some instances be more than treble damages themselves.

Now, we have considered whether we should not still have interest on the actual portion of a trebled claim, even though it might result in liability far in excess of the trebled amount. But we really did not pursue that issue to conclusion because the Senate and the Congress considered that issue in 1980, and for reasons that I am sure you recall and that seemed sufficient, decided that that was not an appropriate approach to this problem.

The CHAIRMAN. In your proposal for claims reduction in cases other than the price-fixing variety, the amount by which the claims would be reduced would be determined by the relative responsibility of the settling defendant. Could you explain how such relative responsibility would be determined?

Mr. GINSBURG. In a price-fixing case, Senator, the relative responsibility would normally be the portion of the plaintiff's purchases that were made by that particular defendant. If it is a class action, and the plaintiff is there on behalf of all purchasers in the class, then the defendant's market share would establish its relative responsibility.

In other cases—vertical cases, for instance—the court would determine responsibility based on such factors as who organized the conspiracy and who policed it, as opposed to those who just went along with it.

The CHAIRMAN. The distinguished Senator from Iowa.

Senator GRASSLEY. No, I have no questions, Mr. Chairman.

The CHAIRMAN. Senator Metzenbaum just stepped out. We will see if he has anymore questions.

[Pause.]

The CHAIRMAN. We will see if Senator Metzenbaum has further questions, and then we will have a panel consisting of Donald F. Turner of Wilmer, Cutler & Pickering, in Washington, DC; Judge Charles B. Renfrew, vice president and director of the Chevron Corp., San Francisco, CA; Steven C. Salop, professor of law and economics, Georgetown University Law Center, Washington, DC; and Hon. Robert Abrams, attorney general, the State of New York. We will call you up in just a minute.

Senator Metzenbaum, do you have anymore questions.

Senator METZENBAUM. Mr. Chairman, I do, but I think I am going to pass for the time being so we can hear some of these other witnesses.

The CHAIRMAN. All right. Thank you very much, Professor Ginsburg.

Mr. GINSBURG. Thank you, Mr. Chairman.

The CHAIRMAN. We will ask the next panel to come up now: Mr. Turner, Mr. Renfrew, Mr. Salop, and Mr. Abrams on the end.

We are pleased to have all you distinguished gentlemen here.

Mr. Turner, we will hear from you first.

Senator **Metzenbaum**. Let me just ask before you proceed, Mr. Renfrew, you were before our committee many years ago, and I am trying to remember. Will you refresh my recollection?

Mr. **Renfrew**. Mr. Chairman, I have been before this committee on a number of occasions. I testified with respect to the Antitrust Improvements Act of 1979, subsequently 1980. While I was Deputy Attorney General, I testified on many oversight occasions, and I testified in connection with the contribution and claim reduction legislation of several years ago. I have had the privilege and honor of testifying a number of times before this committee.

Senator **Metzenbaum**. It is nice to have you back.

Mr. **Renfrew**. Thank you, Senator.

Senator **Metzenbaum**. Mr. Chairman, I would like to recommend to you, since we know we have a cloture vote at a time-certain, I think about 11:30, whether you would not see fit in your own judgment to limit these gentlemen to so many minutes per person. I am concerned that otherwise we will not get a chance to hear all of them.

The **Chairman**. We will see—if you all could stay to 7 or 8 minutes if you could, and summarize, and then we can ask questions. We will place your entire statements in the record, but if you could give a brief summary in 7 or 8 minutes, that would help. I do not want to restrict you too much; some of you have come a long way, and you have all done a lot of work and you have excellent statements.

We will start with you, Mr. Turner.

STATEMENT OF A PANEL, INCLUDING: DONALD F. TURNER, ESQ., WILMER, CUTLER & PICKERING, WASHINGTON, DC; HON. ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NY, ACCOMPANIED BY LLOYD CONSTANTINE, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION; CHARLES B. RENFREW, DIRECTOR AND VICE PRESIDENT, LEGAL, CHEVRON CORP., SAN FRANCISCO, CA; AND STEVEN C. SALOP, PROFESSOR OF LAW AND ECONOMICS, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. **Turner**. Thank you, Mr. Chairman.

I appreciate this opportunity, and I understand that my prepared statement will be entered in the record.

The **Chairman**. Your entire statement will go in the record.

Mr. **Turner**. Thank you.

Mr. Chairman, as is indicated in my prepared statement, there are several premises or arguments that are involved in the proposal to limit treble damages that I agree with.

As I indicated in my statement, Prof. Carl Kaysen and I back in 1959 in our book on antitrust policy strongly urged that treble damages be limited to plain violations of the law which would normally be subject to criminal sanctions; that it was simply unfair, since treble damages were punitive, to impose treble damages in cases where the law was not clear, which of course is typically categorized as rule of reason.

Now, as you the committee members well know, large areas of antitrust law are not clear. Indeed, even in the areas where the courts have used the per se label, there are economic and related issues that have to be explored before an assessment can be made.

For example, as the court noted in the recent BMI case, even if you have something that is described as a price-fixing agreement, the court has to ask the question whether it is the kind of price-fixing agreement which is properly subjected to the per se rule of illegality.

Now, that is a clear indication—in fact, the BMI case was an example of that—that horizontal agreements, even price-fixing agreements among competitors, that are ancillary to a venture which is procompetitive or puts in the market a product not otherwise available, has to be tested under the long-known ancillarity doctrine—is the agreement reasonably ancillary to this legitimate venture.

Similarly, the court now has made it perfectly clear that even though it may be loosely said that tying contracts and collective boycotts are illegal per se, in fact, there are both definitional problems and economic factors that have to be examined before the court can apply the per se label.

In tying cases, for example, it has to be shown that there is market power in the tying product and a substantial dollar amount of foreclosure of the tied product.

Collective boycotts are subject to the per se rule only where the group, the venture involved, has market power or an essential facility or component for competition.

So in other words, the areas of antitrust law that are crystal-clear are rare. And when you get into the rule of reason area, such things as nonprice vertical constraints and the like, it is often very hard to determine in advance the likely outcome of litigation For one thing, it is hard to know in advance all of the relevant facts. And furthermore, you do not know in advance for sure just how a court or a jury is going to assess and weigh the alleged anticompetitive effects and the procompetitive benefits.

That being so, as Mr. Ginsburg indicated in his statement, to make treble damages available in the rule of reason and similar areas, by imposing an enormous risk, is certain to cut back firms' decisions to embark on conduct or do things with procompetitive benefits, and that is going to hurt consumers.

By the way, members of the committee, one of the most serious reasons for unpredictability is, as you know, that civil cases are typically tried to juries, and in most cases, the jurors simply do not have the background necessary to assess the economic and business factors that have to be assessed to reach a rational decision. And one of the risks—and I have seen this from time to time, and other lawyers have—in an awful lot of cases, is that one of the defendant's employees or officers has made some crazy unauthorized statement that is very damaging; and the result is that even though the corporation did not have the intent indicated by that employee's statement, typically the courts say, "But that can go to the jury," and it may lead the jury to find against the defendant. So these are the risks.

Now, I concur that the mandatory treble damage rule should be eliminated. I have felt this way for three reasons. First, it is just terribly unfair to subject defendants to punitive damages in cases where there is something less than a clear violation of the law. It is unfair and inconsistent with the typical tort rules on punitive damages.

Second, I do believe that the existence of treble damages across the board does encourage plaintiffs in many cases to bring very weak or frivolous suits in the anticipation of getting defendants to settle to avoid the costs of litigation and the risk of a jury finding against them. And by the way, John Shenefield, gentlemen, testified against the administration proposal a couple of weeks ago before the House Committee, and as I quoted in my prepared statement, he agreed that many private cases are brought with impure motives, and it is treble damages that encourage that.

Third, the threat of treble damages discourages procompetitive conduct in the rule of reason areas.

Therefore, I think it is clear that the Congress should cut back the scope of treble damages. The more difficult question, of course, is how you are going to do it, how you are going to phrase the statutory proposal; what kind of criteria are you going to use.

I agree with Mr. Ginsburg's comment that to simply give discretion to the judges is far too vague and would undercut the benefits of cutting back treble damages, mandatory treble damages, because you just never know how things are going to come out. That is too vague.

I also agree that limiting treble damages to per se violations is an inappropriate and vague test. The Supreme Court itself has said the line between per se and rule of reason is not clear. And as I indicated, many per se rules in fact do not get reached until after rule of reason type of inquiry. And I think probably that to say that treble damages shall be limited to cases which involve violations subject to criminal sanctions, although that is better than the other two proposals I just commented on, would be a little vague because there is hardly any clear judicial precedent as to what kinds of antitrust violations would be subject to criminal sanctions, because the Department of Justice policy has almost invariably been to file a criminal case only where an absolutely clear violation, like horizontal price fixing or bid rigging, is being charged so we do not really know how the courts would come out on that.

Now, I think one of the advantages of the administration proposal is that it has a high degree of clarity. There may be some little questions at the edges, but it is pretty clear what major areas are covered by the treble damage provision and what are not.

Now, I suppose, then, that the question that would concern everybody, is whether the scope of the proposal incorporated in S. 2162 is appropriate; is it too narrow, or is it overinclusive.

As I suggest in my statement, I think in at least one respect it might be overinclusive because it retains treble damages in suits for violations of the Robinson-Patman Act brought by a secondary line competitor, and I think that is very questionable.

The chief objections that are probably going to be raised are in terms of underinclusiveness. Senator Metzenbaum, you raised the question whether distributors who are cut off pursuant to unlawful vertical restraints, you suggested that perhaps they should have the right to treble damages, and I think you were also implying, as I indicated, that competitors eliminated by predatory behavior should be entitled to treble damages. I think there is not an overpowering argument one way or the other on those two categories, but I do not think eliminating those categories from treble damages is a serious defect, particularly in light of the proposal that interest be added to actual damages. Most so-called predatory behavior involves a close economic analysis. And vertical restraints, the same thing—the law is still vague on vertical restraints. And indeed, even after *Monsanto,* it is hard to tell what evidence supports the finding of a resale price maintenance agreement.

So I do not think those are great defects.

Now, I had another sort of suggested approach which does have some vagueness problems. But my conclusions are, gentlemen, that it is absolutely desirable for Congress to cutback the scope of treble damages. And when you get to the question of how to do it, clarity is an important advantage, and I think the administration proposal is reasonably clear. And, while it may be thought it is either overinclusive or underinclusive in some respects, I think on the whole it is very defensible. And certainly, if the Congress decides to adopt a different kind of proposal, you should keep in mind the goals—namely, fairness, reducing incentives to frivolous suits, and increasing the incentives to engage in behavior that has procompetitive benefits.

I think that even if suits in the "rule of reason" area were discouraged by this proposal, it is as plausible that consumers would benefit in the longrun as that they would be harmed, because it would encourage firms to embark on conduct that has some procompetitive possibilities, and I have a hunch in the longrun that consumers will benefit.

Thank you. I hope I did not talk too long.

[Prepared statement and responses to questions follow:]

PREPARED STATEMENT OF DONALD F. TURNER

I appreciate the Committee's invitation to present my views on S.2162, the Antitrust Remedies Improvements Act of 1986. I shall focus my attention on the provision of Section 201 limiting the trebling of damages in private antitrust actions to damages sustained by plaintiffs "by reason of . . . having been overcharged or underpaid by any person subject to liability under the antitrust laws."

For reasons that will be set forth, I agree with the basic proposition that treble damages should not be mandatory in all private antitrust cases. The much more difficult question is how the proper scope of the treble-damages remedy is to be defined. In this connection, I shall analyze the tests incorporated in Section 201 and also discuss briefly some possible alternative approaches. As a background, I shall briefly set forth the characteristics of antitrust laws that are pertinent to the treble-damage issue.

I

THE NATURE OF ANTITRUST LAW

As the Committee members are well aware, the principal antitrust law provisions are framed in vague general terms that leave to courts the task of determining the scope of antitrust prohibitions and formulating the standards of illegality applicable to various types of business conduct. Although the Sherman Act is framed as a criminal statute, the courts properly did not feel bound by constitutional restraints requiring clarity of criminal law when formulating antitrust rules in the civil litigation area. Rather, the courts have developed and reassessed antitrust rules in the manner of the common law.[1]

While the courts have recognized the administrative and predictability advantages of simple per se rules, they have also recognized that in most categories of business conduct--even including some forms of collaboration among competitors--the probability that procompetitive justifications may outweigh any facially anticompetitive aspects is sufficiently high that the conduct must be assessed under the "rule of reason" approach. In other words, the basis for a per se rule is a conclusion that the anticompetitive effects of the conduct in question are clear and the possibility of a procompetitive justification too low to warrant case-by-case evaluation.

Indeed, the so-called "per se" rules are not as simple as the label implies, since they require determining the characteristics of conduct subject to per se illegality and, in some instances, do not reach the per se illegality conclusion until after proof of such elements as market power. For example, exchanges of market information among competitors are not treated as per se unlawful merely on the basis that the information exchanged has effects on prices. Moreover, as the Supreme Court held in the BMI case,[2] the Court must ask whether a "price-fixing" agreement is of the kind properly subject to per se treatment. Market power and/or other findings are predicates to the finding of per se illegality in the areas of collective refusals to deal and tying arrangements. See Northwest Wholesale Stationers[3] and Hyde.[4]

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[1] The standard government enforcement policy has been to file criminal antitrust suits only in cases where the conduct involved is a clear violation of the law, such as horizontal direct price-fixing agreements. It is virtually certain that courts would reject a criminal indictment involving conduct which could be found illegal only after an extensive economic analysis.

[2] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

Finally, the courts, recognizing that the primary goal of competition laws is to preserve and promote benefits to consumers, have increasingly taken economic analysis and studies into account in formulating and reformulating substantive antitrust rules.[5] As has often been stated, the function of the antitrust laws is to protect competition, not competitors as such.

Because so much of antitrust law is complex and subject to revision, assessing in advance the legality of certain kinds of contemplated conduct is often difficult, so that a confident prediction of the outcome of litigation cannot be made. Predictability is complicated by the fact that private antitrust actions are generally tried to juries (absent dismissal or summary judgment), and jurors rarely have the capacity to assimilate and understand the kinds of economic and business issues that must be assessed to reach a verdict.

Given the wide, varying, and changing scope of antitrust laws, the lack of clarity in many areas, and the fact that a number of potentially illegal types of conduct may have procompetitive benefits, the appropriateness of mandatory treble damages is clearly questionable and deserving of congressional reexamination.

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[3] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S.Ct. 2613 (1985).

[4] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[5] See, e.g., GTE Sylvania, Inc. v. Continental TV, Inc., 433 U.S. 36 (1977)(reversing Schwinn holding that non-price vertical distribution restraints were illegal per se, and substituting the "rule of reason").

II

THE MANDATORY FEATURE OF TREBLE DAMAGES SHOULD BE ELIMINATED

It has been my view for a long time that treble damages should not be mandatory in all private antitrust cases. In our book on antitrust policy published in 1959, Professor Carl Kaysen and I, after noting that criminal sanctions would appear to be appropriate only in cases "where conduct may be unambiguously denominated bad," and that the considerations concerning criminal sanctions were also pertinent to private actions for damages, concluded that:

> It is unfair for private plaintiffs to collect treble damages for conduct the illegality of which cannot readily be determined in advance.6/

And, in our recent antitrust law treatise, Professor Philip Areeda and I commented that

> treble damages are indisputably punishment. Accordingly, they should not be awarded in the absence of factors similar to those justifying criminal sanctions.7/

I agree that the issue is not a simple one, because treble damages do serve certain useful functions. Private actions are plainly an important adjunct to government enforcement of the antitrust laws. Treble damages provide a powerful financial incentive for parties to detect and sue for violations of antitrust law, and discourage illegal conduct by increasing the cost to the violator. Also, treble damages probably encourage defendants to settle well-founded claims.

On the other hand, the mandatory treble-damages rule has had the countervailing adverse effects of encouraging baseless or trivial suits brought with the prospect of

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6/ C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 257 (1959).

7/ 2 P. Areeda & D. Turner, Antitrust Law 34 (1978).

coercing defendants into substantial cash settlements in order to avoid the costs of litigation and the risk that bits of evidence--such as damaging but unwarranted statements by employees--may lead to adverse jury verdicts. While opposing the Administration proposal in his testimony before the House Judiciary subcommittee, John Shenefield agreed:

> Private cases proceed on all kinds of theories, some sound, some less so, and many are no doubt undertaken for impure motives.[8/]

Moreover, the magnified risks created by treble damages are certain to discourage procompetitive behavior in the gray "rule of reason" areas of the law, since firms run the risk that courts or juries may reject their defense. And, as I have noted, mandating treble damages in all private cases is inconsistent with the usual standards for punitive damages, which are similar to those applied to criminal sanctions.[9/] It is also possible that the mandatory treble-damage rule may in some instances discourage courts from expanding the standards for antitrust liability, because they think it inappropriate to saddle violators with treble damages.

III

STATUTORY SOLUTIONS

As suggested above, the basic purposes in formulating limitations on the scope of treble damages are to achieve fairness, lower the incentive for the filing of dubious private suits, and lower the disincentives to engage in

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8/ Hearings on Proposals To Amend the Antitrust Laws Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986)(statement of John H. Shenefield).

9/ See Prosser & Keeton on the Law of Torts 9 (5th ed. 1984)(punitive damages permitted "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime . . . .")

facially restrictive conduct that in fact has procompetitive benefits.

1. The simplest statutory solution would be to leave the assessment of multiple damages to judicial discretion. This has some superficial appeal:

> A statutory change that grants courts discretion to withhold multiple damages has one significant advantage over more dramatic reform proposals. It recognizes the complexity of the issue, the imperfect knowledge that exists about the impact of private antitrust litigation, and the variances in antitrust analysis depending upon factual contexts.[10]

However, while preferable to the mandatory treble-damage rule, the mere grant of discretion would not be a good solution. In the absence of statutory guidelines, courts would be very likely to take varying and even inconsistent approaches, and the formulation by higher courts of appropriate criteria and standards would take time and pose the same difficulties that Congress confronts in limiting the scope of treble damages. Moreover, the high uncertainties created by a mere delegation of discretion to the courts would substantially undermine the benefits to be obtained from modifying the mandatory treble-damages rule. Thus, it is important that legislation limiting the scope of treble damages incorporate criteria that substantially reduce uncertainties.

2. Another simple solution would be to limit treble damages to conduct that is *per se* unlawful. But that, too, is a poor solution, given (as the Supreme Court noted in the *NCAA* case) that there is no clear dividing line between *per se* and "rule of reason," and that the *per se* label is often applied only after assessment of various economic factors. Moreover,

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[10] G. Garvey, *Report to the Committee on the Judiciary, U.S. House of Representatives--Study of Antitrust Treble Damage Remedy*, 46 Antitrust & Trade Reg. Rep. (BNA) 356, 369 (Mar. 1, 1984).

such a test would complicate litigation by encouraging such plaintiffs as terminated distributors to include per se claims in every case. It might also tend to distort substantive law by affecting judicial decisions as how and when the per se label should be applied.

3. A third relatively simple solution would be to limit treble damages to violations that would be subject to criminal sanctions. However, given the lack of clear judicial precedents defining antitrust offenses that could constitutionally be subjected to criminal sanctions, there may again be considerable uncertainty as to how individual courts would resolve the issue and what general standards would eventually evolve. Such a statutory test also would raise the danger that courts would place undue weight on bits of evidence suggesting anticompetitive intent.

4. Whatever objections might be made to its coverage, Section 201 has the virtue of a high degree of clarity in limiting trebling to damages resulting from overcharges to buyers or underpayments to sellers by parties liable under antitrust law.[11/] It appears clearly to cover the following:

(1) such naked horizontal restraints as direct price-fixing and market allocation agreements and agreements to restrict output or limit expansion of capacity;

(2) Robinson-Patman Act price discrimination suits brought by buyers who have been charged a higher price than the price charged one or more of the buyers' competitors;

[11/] As I read it, Section 201 does not limit trebling to damages measured by the overcharge or underpayment and, in fact, true damages, in terms of lost profits or business, may be higher or lower. See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

(3) Sherman Act Section 2 cases brought by buyers against a seller who unlawfully monopolized the market, or by sellers against a buyer with unlawful monopsony power;

(4) Buyer suits claiming overcharges as a result of unlawful resale price maintenance.

The proposal would also appear to cover tying cases brought by a buyer who proves that the tying contract forced him to pay more for the tying product plus the tied product than he would have had to pay in the absence of a tying contract.

Among the areas of antitrust violations clearly not covered by the proposal are:

(1) suits based on individual or collective refusals to deal; and

(2) suits by competitors based on predatory pricing, such other forms of predation as conduct raising competitors' costs,[12/] exclusive dealing arrangements with customers or suppliers, or tying contracts.

There may be some questions regarding the scope of Section 201's coverage. For example, does the term "overcharge" cover agreements by horizontal competitors to eliminate such forms of non-price competition as freely providing ancillary services or complementary products to purchasers of the main product involved? Another question: does the term cover increased prices resulting from unlawful non-price vertical restraints such as territorial restrictions on distribu-

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[12/] See, e.g., United States v. American Tobacco Co., 328 U.S. 781 (1946)(involving a conspiracy to exclude rivals by bidding up the prices they had to pay for their raw materials).

tors? (I would suppose that the answer to both questions is "yes.")

The remaining question is whether Section 201 is either overinclusive or underinclusive. This is hard to assess without a close look at various areas covered or not covered.

It may be that the proposal is overinclusive in some respects. For example, it is doubtful that treble damages are appropriate for a Robinson-Patman Act "secondary line" violation, given the complexities in assessing the cost defense and the meeting competition defense and the potential conflict--recognized in some judicial decisions--between the Robinson-Patman Act and the competitive goals of the Sherman Act.

As for underinclusiveness, it might be argued, for example, that treble damages should be available to distributors terminated pursuant to an unlawful resale price maintenance scheme or other plainly unlawful vertical or horizontal restraints, and to competitors damaged by predatory pricing or other unlawful monopolizing behavior. For a number of reasons, my tentative view is that the lack of such coverage is not a serious defect. Continuing the threat of treble damages for refusals to deal and low pricing may well tend to discourage procompetitive behavior. The law is unclear as to what constitutes adequate evidence of unlawful non-price restraints or the existence of resale price maintenance agreements; and there are still court differences as to what constitutes true predatory pricing, which is a rare phenomenon. Since prevailing plaintiffs can recover actual damages, reasonable attorneys' fees and other litigation costs, and since Section 201 would add recovery of interest, I doubt that the unavailability of treble damages would significantly reduce the incentive to bring cases likely to be well founded. Moreover, unlike covert anticompetitive behavior, which may cost much to uncover, refusals to deal and behavior damaging to competitors are in the open. Also, the class action vehicle means that treble damages for buyers paying higher prices attributable to unlawful vertical restraints or monopolization preserves a substantial disincentive to engage in such unlawful behavior. For example, the threat of a buyer class action suit for treble damages greatly lowers a firm's prospect for recouping the short-term losses from predatory pricing by charging monopoly prices after competitors are driven out.

In any event, if it were thought appropriate to extend treble damages to invidious refusals to deal and predatory conduct, the scope of the extension would have to be carefully defined in order to meet the objectives of fairness, discouraging ill-founded suits, and promoting the incentives to engage in conduct with procompetitive benefits.

5. As an alternative to specific listing of forms of unlawful conduct subject to treble damages, it may be possible to formulate general standards that minimize uncertainties and have an appropriate scope. For example, it might be specified that treble damages be limited to "clear violations," defined as cases in which:

> (a) the law was clear at the time the conduct occurred; and
>
> (b) the factual predicates for liability, including *inter alia* the anticompetitive nature of the conduct and the plain absence of any procompetitive justification, are clear.

However, while I believe there is merit in such an approach, I concede that it has some vagueness problems, resolution of which would require further elaboration.

I recognize that this alternative, like the Administration proposal, may tend to discourage private actions in complicated "rule-of-reason" areas, but such an effect is moderated by the fact that plaintiffs are entitled to recover not only actual damages but reasonable attorneys' fees and other litigation costs; and the effect would further be moderated, if not eliminated, by adopting the Administration proposal that plaintiffs also be normally entitled to recover prejudgment interest on damage amounts--a proposal which I believe to be well founded, not only for that reason, but also because it is fair and would discourage plaintiffs and defendants from prolonging litigation.

Moreover, lowering of incentives to bring close cases in the rule-of-reason areas--where there are significant procompetitive probabilities--would not lead to significant consumer harm. Indeed, by lowering firms' disincentives to engage in economically beneficial behavior, the consequence may well be a net consumer gain.

* * *

To sum up, my conclusions are as follows:

1. The mandatory treble-damage rule should be eliminated.

2. Section 201, while arguably overinclusive or underinclusive in some respects, is on the whole a defensible proposal, and would be much more acceptable than the present mandatory treble-damage rule.

3. The provision for awarding prejudgment interest substantially reduces any possible adverse effects from narrowing the scope of the treble-damage rule in the manner proposed.

4. While there may be modifications or alternative proposals worthy of consideration, Congress should be careful to keep in mind the goals of fairness, reducing the incentives to the filing of unmeritorious suits, and increasing the incentives to engage in conduct promoting efficiencies and other procompetitive gains, which are beneficial not only to the firms concerned but to consumers and the economy generally.

In concluding, I also wish to note that regardless of the proper scope for treble damages in antitrust cases involving domestic commerce, the assessment of treble damages in cases involving foreign commerce and foreign defendants raises an additional serious problem that may well warrant a separate statutory provision permitting courts to eliminate treble damages in certain circumstances.

QUESTIONS BY SENATOR THURMOND

1. While I am not completely familiar with the legislative history of the Sherman Act treble-damage provision, I believe that Congress was concerned with the serious effects that monopoly mergers, other monopolizing conduct, and price-fixing agreements were having on the U.S. economy; and adopted treble damages both to facilitate private damage actions and to deter future repetition of the kind of conduct that led to the passage of the Act. As indicated in my prepared statement, I do not believe that the reasoning which led to the treble-damage rule warrants treble damages for all antitrust violations.

2. I cannot imagine that the originators of treble damages anticipated that they would create incentives for abusive suits by competitors or other parties. The scope of antitrust law has been extended far beyond the plainly anticompetitive conduct that was the original target of the Sherman Act, and into many areas where the determination of legality or illegality hinges, _inter alia_, on intent and on complicated economic analysis. As a result, summary judgments for defendants in weak cases have been rarely obtainable and jury verdicts hard to predict. These developments put pressure on defendants to settle even in cases where they believed they had not violated the law.

3. Strictly speaking, the term "_per se_ illegal" means that an agreement is illegal as such: no other facts need to be proved or considered, and no justifications will be entertained. The only violations fitting this category are such naked horizontal restraints as price-fixing and market allocation agreements and vertical resale price maintenance agreements. The Administration proposal preserves treble-damage liability in this area except where the horizontal or vertical price-fixing agreement is on maximum prices, because in the latter case there is no "overcharge." I should note, however, that the extension of the _per se_ rule to maxi-

mum price-fixing agreements is open to question, particularly in the case of vertical maximum price-fixing agreements. Accordingly, elimination of treble damages in such cases makes sense.

As indicated in my prepared statement, the Administration proposal does not preserve treble damages in the area of collective boycotts, even for those falling within the so-called "per se" category. Treble damages are preserved for buyers able to prove overcharges attributable to unlawful tying contracts, but competitors attacking tying contracts would not be entitled to treble damages.

4. Off hand, I am unable to identify other types of violations for which the application of the Administration's proposal is unclear.

5. I am not sufficiently familiar with business decision making to make an overall assessment as to the extent to which limiting the scope of treble damages would affect deterrence. I have no doubt that sensible businessmen take into account the possible penalties from a finding of an antitrust violation and, of course, treble damages increase the potential loss. However, as indicated in my statement, limiting treble damages to such clear violations as horizontal minimum price-fixing agreements and injuries caused by higher prices attributable to unlawful monopolizing conduct may well be beneficial by reducing the deterrence to conduct with procompetitive benefits.

6. I have not carefully examined any statistical studies that may indicate the magnitude of groundless antitrust suits. Moreover, making or assessing such studies is extremely difficult because it requires a close evaluation of the facts and applicable legal principles in each case. In any event, I do not believe that any such studies are a necessary predicate for cutting back on the mandatory treble-damages rule, because it seems clear that the mandatory

rule is unfair, does provide incentive for frivolous suits, and creates a disincentive to procompetitive conduct within the gray areas of the law.

SENATOR METZENBAUM'S QUESTIONS

1. Certainly the treble-damage remedy does tend to deter such plainly unlawful conduct as price fixing, but horizontal price-fixing and bid-rigging agreements are still disturbingly frequent.

2. I would suppose that most business executives are aware of the potential for treble damages, but, as indicated in my statement, this has bad as well as good effects.

3. I believe the Georgetown Study is open to varying interpretations.

4. I have not had the opportunity to think through the Administration's claim reduction proposal or alternatives, but I do believe that some such statutory provision is in order. It is clear that the Administration proposal does in some cases require defining the relevant market and determining the market share of the settling party or parties. However, unlike many merger cases, I believe these issues would usually be relatively simple in a price-fixing case.

The CHAIRMAN. Thank you very much, Professor Turner.

You were in charge of the Antitrust Division during what years?

Mr. TURNER. 1965–68.

The CHAIRMAN. That was during President Johnson's administration.

Mr. TURNER. Yes, that is right. President Johnson appointed me.

The CHAIRMAN. Now, I think we will alternate here and we will take the attorney general of New York next.

STATEMENT OF HON. ROBERT ABRAMS

Mr. ABRAMS. Thank you very much, Senator.

I would like the committee to know that seated to my right is Lloyd Constantine, the assistant attorney general in charge of the antitrust bureau in New York State.

I will submit my lengthy statement for the record, and I will synthesize in 5 minutes the essence of my written testimony.

The CHAIRMAN. Thank you very much. Your entire statement will go in the record.

Mr. ABRAMS. Thank you.

Let me just initially indicate that it is my personal belief that this administration has abandoned its responsibility to enforce the antitrust laws of this land. It ignores section 7 of the Clayton Act, and it has adopted an enforcement policy in the area of vertical restraints which amounts to a policy of no enforcement. While it has brought some price-fixing and market allocation cases, the antitrust division has intervened in private actions, taking the side of the price-fixing defendants, and sought to undermine the law.

Moreover, in a historic reversal in function, we in the States find ourselves today doing the investigations and cases which formerly emanated from the Federal authorities. This month, for example, Attorney General Sachs of Maryland and I instituted Federal civil antitrust suits against the Minolta Corp., alleging a nationwide resale price maintenance conspiracy.

California has sued to block the Texaco-Getty merger. Texas has attempted to enjoin a merger of Coke and Dr Pepper bottlers. And we in New York are engaged in litigation with the four largest brewers over their nationwide adoption of exclusive territories.

However, the most serious assault on the antitrust laws is the administration's so-called reform package of which the remedies bill is but one part. And let me get right to that.

While I endorse the proposal to permit the antitrust division to seek treble damages, in fact, the administration proposal would do away with treble damages in the area where they are most needed—namely, private antitrust suits that do not result in overcharges or underpayments which comprise the majority of all of the private suits. Many types of highly anticompetitive and illegal arrangements, such as tying arrangements, group boycotts, and horizontal market allocation schemes, might be left without the treble damage remedy. In such cases, the anticompetitive effects are extremely harsh, but are not in the form of what may ultimately be interpreted as overcharges or underpayments, as Senator Metzenbaum pointed out in his questioning of Mr. Ginsburg.

Monopolization offenses would also be limited to single damages. I think this is illogical in the extreme. What possible justification can there be for rewarding the monopolist who completely asphyxiates competition by reducing his potential exposure to damages?

The opportunity to recover treble damages provides an incentive to injured parties to enforce the antitrust laws of this country. These so-called private attorneys general are an important ingredient in the effective enforcement of the antitrust laws of the country, and they do not involve the expenditure of taxpayer money.

Second, the deterrence value of treble damages is universally acknowledged. Deterrence is not to be put aside lightly. Measures which would tend to make violations more attractive would substantially diminish the effectiveness of our most important enforcement tool.

Closely related to deterrence is the fact that the trebling of damages tends to compel violators to more completely disgorge their ill-gotten gains than single damages could.

Treble damages have served well in the social, economic, and political quest of a free people to remain so. To put the remedy aside at this time, when the need for it is no less than it was in 1890, would seem to be a wreckless course of action for a nation that is dedicated to a free enterprise economy.

The administration argues that the remedy has overdeterred potentially procompetitive conduct. This assertion, I think, is demonstrably false on empirical grounds. Our Nation is experiencing an unparalleled wave of megamergers. Vertical restraints are ubiquitous and were so even during the period prior to the 1977 Sylvania decision when they were subject to per se analysis. Just as they have opposed any alteration of mandatory treble damages, the National Association of Attorneys General also opposes the administration's proposal for cutting back on the justifiably severe rule of joint and several liability for antitrust conspirators. Members of this committee know that this is but the most recent attempt to alter this rule. The proponents have always been the same individuals—namely, those corporations that have been engaged in price fixing and their attorneys. The rule has its clearest and most frequent application in multidefendant price-fixing and bid-rigging cases. This legislation would therefore benefit those who have committed the most serious violation of the antitrust laws. It is legislation that is detrimental to injured States, to taxpayers, businesses, as well as consumers.

States are aggressively attempting to recover damages for themselves as a result of bid rigging and to protect their citizens by seeking restitution in parens patriae cases. It is for this reason that 4 years ago in 1982, the National Association of Attorneys General unanimously adopted a resolution opposing any alteration of the rule imposing joint and several liability upon antitrust violators.

The last feature of the remedies bill upon which I would like to comment this morning, Mr. Chairman, would provide attorneys' fees for prevailing defendants under certain circumstances. I personally support this measure, but if and only if it is amended so as to provide attorneys' fees for prevailing defendants in cases that are judged to be either frivolous or maintained in bad faith. This measure would completely address the only serious concern that is raised by the administration when introducing this bill, which is the potential coercion of an innocent defendant to a frivolous lawsuit because of the great expense of defending it to judgment.

So, Mr. Chairman, this synthesizes many of the basic points that I made in my lengthy and more formal statement.

Senator METZENBAUM. You are speaking on behalf of the National Association of Attorneys General?

Mr. ABRAMS. Senator Metzenbaum, with regard to the position of joint and several liability and treble damages, I can say yes, because resolutions have been passsed unanimously on those two subjects. I suspect that some of the other comments that I have had may not be 100 percent subscribed to by every, single member of the association, but the underpinning of the issues here of remedies clearly are supported by all of the attorneys general across the country, irrespective of party affiliation.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Thank you very much, Mr. Attorney General. We are glad to have you with us.

Mr. ABRAMS. Thank you, Mr. Chairman.

[Prepared statement follows:]

PREPARED STATEMENT OF ROBERT ABRAMS

Senator Thurmond and members of the Committee. On behalf of New York State and the National Association of Attorneys General, whose Antitrust Committee I chair, I want to thank you for the opportunity to sit on this distinguished panel and express grave concerns about the proposed "Antitrust Remedies Improvement Act of 1986".

Allow me to preface my comments on this bill with some observations about the manner in which the Administration is enforcing the Antitrust Laws which now exist. This enforcement record is germane because it unequivocally demonstrates the hostility to sound antitrust enforcement exhibited by the framers of this bill.

The antitrust enforcement agenda can be roughly divided into three categories. Horizontal restraints, vertical restraints and monopolization and merger offenses. I will not belabor what must be obvious to this Committee, which is that the Administration simply does not enforce the law concerning vertical restraints. The Antitrust Division's activities in this area have focused on the issuance of guidelines and _amicus curiae_ intervention aimed at preventing private parties and state attorneys general from enforcing the law as written and unequivocally interpreted by the Supreme Court. Vertical Guidelines issued in January 1985 were a brazen and contumacious end run around Congressional restrictions placed on the Division after its _amicus_ intervention in the _Monsanto_ case.

In the merger area, Clayton Act Section 7 is ignored. A brief illustration. When Paul McGrath, then the head of the Antitrust Division, initially sought to block the 1984 Merger of LTV and Republic Steel, Commerce Secretary Baldridge called for the repeal of Section 7. McGrath's response was that Section 7 did not add anything to Section 1 of the Sherman Act, so that repealing Section 7 would be a meaningless gesture. I doubt that the Congressional framers of the 1914 Act or the 1950 Amendments thought that they were enacting standards devoid of meaning beyond that existing in Section 1. However, that is the way this Administration has enforced the law and the ultimate resolution of the LTV - Republic situation is eloquent testimony to that fact.

The Administration has had a good record in prosecuting certain hardcore horizontal price-fixing and market allocation arrangements. I would suggest, however, that most of these cases, which involve bid rigging on state highway and electrical projects, could be handled as efficiently by State Attorneys General or United States Attorneys offices. We have generally looked to the Division and the FTC for cases with a nationwide scope and impact: such as multidistrict national price-fixing cases and cases involving national resale price maintenance schemes, or mergers whose anticompetitive effects touch upon many states. In a historic reversal in function, we in the States find ourselves doing the investigations and cases which formerly emanated from the federal authorities. This month, Attorney General Saxe of Maryland and I instituted federal civil antitrust suits against the Minolta Corporation, alleging a nationwide resale price maintenance conspiracy. The same complaints which were received by our offices were conveyed to federal authorities, who apparently declined to act.

Attorney General Van de Kamp of California was forced to file suit to block the Texaco-Getty merger after the FTC's bandaid consent decree approach failed to address the serious anticompetitive effects of that transaction.

Attorney General Mattox of Texas was forced to file suit against a merger of Coca Cola and Dr. Pepper bottlers which produced a Herfindahl concentration in the industry which exceeded 2500 but somehow had escaped the notice of the federal authorities.

In my own state, we are engaged in litigation with the four major national brewers, Anheuser Busch, Miller Brewing, Heilman and Strohs concerning their adoption of exclusive distributorships throughout the country. The federal enforcement authorities failure to act in the beer industry is especially curious since both the FTC and the Antitrust Division have repeatedly told this Committee that they believe that this highly concentrated industry has special characteristics which make the type of vertical restraints adopted in that industry singularly anticompetitive.

Even within the area of hardcore covert price-fixing, where there is an articulated consensus about the proper enforcement posture, the federal government has stopped bringing national price-fixing cases. The multidistrict litigation consolidations which follow a federal enforcement action are an accurate barometer. In the period 1974-77, twenty-one antitrust actions were consolidated for multidistrict proceedings by the Panel. During the period 1978-81, the number was 18. During the last four years only one antitrust action was consolidated.

Empirical data tell only part of the story of this administration's antipathy to antitrust enforcement policies which had enjoyed broad bi-partisan support from every administration before the present one. There is also a record of affirmative mischief. One good example is the "amicus intervention program" whereby the Antitrust Division intervened in private cases on behalf of price-fixers and urged the Courts to abandon the rule of per se legality. The Division mounted a similar effort in the area of tying offenses. However, the most serious assault on the fabric of the law is the Administration's so-called "reform package", of which the Remedies Bill is but one part, albeit the worst, both substantively and because it appears to be receiving serious attention, which cannot be said of the merger proposals.

I will now direct my comments to the Remedies Bill and urge this Committee to keep in mind that our basic federal antitrust statutes have served us well for many years. Business judgments are made daily in reliance on consistency and predictability in the antitrust enforcement area. The presumption in favor of maintaining current legal standards must be rebutted by the Administration's reform advocates before the drastic substantive changes they propose are given serious consideration by Congress.

One aspect of the Remedies Bill which I endorse would provide for treble damage recovery in the Antitrust Division's proprietary lawsuits.

The provision of treble damages for the United States is long overdue. The availability of this remedy should be attended by a direction that it will be sought. The absence of the recovery of damages by the United States, whether single or treble, is a major loophole which allows violators to retain substantial portions of their ill-gotten gains. The frequency with which the United States seeks damages on its own is almost akin to the frequency of the visit of Halley's Comet.

The Administration's proposal would do away with treble damages in the area where they are most needed -- private antitrust suits that don't result in overcharges or underpayments, which comprise a majority of all private suits. Under this proposal, treble damages would still be available to a private plaintiff challenging a resale price maintenance scheme. However, many other types of anticompetitive arrangements, including those in the per se category, such as tying arrangements, group boycotts and horizontal market allocation schemes, might be left without the treble damage remedy. In such cases the anticompetitive effects are extremely harsh but are not in the form of what may ultimately be interpreted as "overcharges" or "underpayments."

Likewise, in the vertical area, non-price rule of reason restraints, such as customer or territorial allocation schemes often have seriously anticompetitive effects which are not in the form of overcharges or underpayments, and the victim would be limited to single damages.

Monopolization offenses would also be limited to single damages. This is illogical in the extreme. Most violations of Sherman Act Section 1 derive from theories concerning the harmful effects of monopolization. A price-fixing conspiracy allows the conspirators to collectively achieve something a monopolist can do alone, which is set or raise price with impunity. What possible justification can there be for rewarding the monopolist who completely asphyxiates competition with a reduced damage formula.

Treble damage recovery coupled with the availability of costs and fees provide an incentive to parties injured, to enforce the antitrust laws of the United States without the direct expenditure of taxpayer revenue. These so-called private attorneys general are an important ingredient in the effective enforcement of the antitrust laws of this nation. They don't cost much. They are effective. And they provide an important bulwark to insure the widest range of enforcement, regardless of the focus and predilections of any given administration. Private parties are likely to realize their injury and its source far earlier than a distant enforcement agency with no personal stake in the outcome of the matter.

The availability of treble damages deters violations of the antitrust laws. The deterrence value of treble damages is universally acknowledged. Deterrence is not to be put aside lightly. A free enterprise law which depends for its efficacy upon the official and formal enforcement actions of the government is a law which is ill-designed and costly. Trebling of damage awards provides a substantial incentive for compliance without substantial appropriations or cumbersome, additional bureaucracies. The official antitrust enforcement resources of the United States and the States pale in effectiveness to the primary enforcers of the antitrust laws--the lawyers who counsel businesses on the legal ramifications of particular courses of conduct. Measures which would tend to make violations more attractive would tend to substantially diminish the effectiveness of our most important enforcement tools.

Closely related to deterrence is the fact that the trebling of damages tends to compel violators to more completely disgorge their ill-gotten gains than single damages ever could. Violations of the antitrust laws are volitional crimes of the sort which are more susceptible to profitability analysis than are other types of crime. The decision to violate the antitrust laws is like many other business decisions. It relies on a formula which takes into account profitablity of detection and the likely consequences of the outcome of all enforcement activities--public and private. The prospect of complete future disgorgement is no small factor in the equation. The notion that single damages coupled with prejudgment interest will accomplish this is misguided. It proceeds on the assumptions that detection will occur at a time when the totality of the injury falls within the statute of limitations and that the entire universe of potential plaintiffs will recover their entitlement. There is no empirical support for these suppositions. Furthermore, the benefits derived from an antitrust violation are not always subsumed within the concept of antitrust damages.

Apparently lost in the shuffle of the explanatory materials produced along with this legislative proposal is the idea of compensation for the injury sustained by reason of the violation. For the same reasons that treble damages tend more toward total disgorgement of illegal profits, they also better compensate the victims than single damages could, with or without interest. If we as a society have to make a choice between slightly over-compensating a victim of crime (let us not forget that violations of the antitrust laws are crimes merely because we are focusing on the civil remedies) or slightly over-enriching the violator, it is difficult to find any reasoned policy basis for favoring the violator over the victim. The demonstrable loss cognizable under the antitrust laws may be small. However, the real world loss to the victim may be substantially greater. The investment or expansion opportunity which was lost by reason of the violator's possession of the cash necessary for it may never come again. Who compensates the business for the opportunity that he had to forego because he was the victim of the violator's scheme? Single damages, even with interest, won't. Treble damages might. The probability that such consequences will and do follow from antitrust violations is sufficiently certain to warrant the election of the remedy which satisfies the likely harms. To make such opportunity losses a part of the affirmative damage proofs would serve no purpose other than the creation of a complex side show in an already complex litigative process. Treble damages have served these valuable services in the social, economic and political quest of a free people to remain so. To put the remedy aside at this time when the need for it is no less than it was in 1890 would seem to be a reckless course of action for a nation dedicated to a free enterprise economy.

The Administration acknowledges the deterrent effect which treble damages have and in fact argues that the remedy has over-deterred potentially pro-competitive conduct. This assertion is not only demonstrably false on empirical grounds but rests on a value judgment about the underlying behavior which finds no basis in the law or in Supreme Court interpretations of the law.

It cannot be seriously contended that the current law has had any in terrorem effect on mergers or the adoption of vertical restraints. Our nation is experiencing an unparalleled wave of mega-mergers. Vertical restraints are ubiquitous and were so even during the period prior to the 1977 Sylvania decision when they were subject to per se analysis. A prime example, again, is the beer industry, where all the major brewers recently adopted air-tight exclusive distribution agreements in the face of current law and the firm ideological opposition of the Antitrust Division, the FTC and the National Association of Attorneys General.

It is clear that even current law has not sufficiently deterred this type of highly anticompetitive conduct because the difficult, lengthy and costly process of proving a rule of reason violation gives firms the incentive to restrain trade now and then stall in the courts for years.

The Administration's real dissatisfaction is with substantive antitrust law and its interpretation by the Courts. For example, the Antitrust Division has clearly called for a presumption of per se legality subject to rebuttal for all vertical restraints of trade. Under their view of the law, intrabrand competition is worthless and a vertical restraint is harmful only if it facilitates collusive horizontal activity. In an analogous manner, the Division treats Section 7 of the Clayton Act as a nullity. Furthermore, by restricting its merger analysis to an inquiry into demonstrated "market power", and by defining "market power" as approaching "monopoly power", Clayton Section 7 has become nothing more than an adjunct to Sherman Act Section 2. The Supreme Court has bought none of this.

The Administration's claim that potentially procompetitive conduct is being over-deterred incorporates its own rejected notions of what is pro-competitive and what are "harmless" restraints of trade.

Although the Georgetown Study has yet to produce many firm conclusions, one theme which was echoed by many of the participants was that alteration of the treble damage remedy was inferior to changing substantive rules concerning violations, if that in fact was the goal. The Administration has chosen the least appropriate manner for foisting its rejected theories of competition on the American public.

This legislation is also an assault from the rear on the per se rule for all antitrust violations other than horizontal price-fixing. Whether or not this measure will accomplish that result, or not, is unclear because of the uncertainties which are attendant upon the use of some of the vague terms employed in this measure. I envision that years of litigation will be necesary to figure out what is meant by such terms as "overcharged or underpaid," "by any person subject to liability under the antitrust laws," and "for such damages." This new formulation of when treble damages will be available will lead to myriad and novel contortions of logic in order to fall within or without the scope of these words. Why should a group boycott be subject to single damages when tying offenses may still be subject to treble damages? Both offenses involve misuse of market power in a coercive manner, to insure that a result obtains which is the product of something other than free market forces. Resale price maintenance is per se unlawful. The overcharge is paid to the retailer who may or may not be a willing participant in the scheme. Is the manufacturer to be subject to single, treble or any damages since he was not the direct recipient of the overcharge from the person injured?

One of the real focuses of this proposal is the competitor litigant whose injury is measured in terms of lost profits. There seems to be an undercurrent to the effect that lost profits are somehow a less worthy form of injury. It is difficult to discern any real difference between profits lost because of an overcharge or underpayment and profits lost because of having been deprived improperly of a business opportunity.

Indeed, as between the two, the latter rather than the former may be more onerous since the victim of an overcharge or an underpayment is more likely to have someone else in the chain of distribution to whom it may pass-on the loss. The reason offered for giving single damages only for lost profits is one of the more salient pieces of illogic to be found in the justifications put forward for this legislation. The competitors' motives are suspect. In an economic system which is driven by the self-interest of businesspeople, it seems inconsistent to posit that they should be trusted to make business decisions but not decisions relating to litigation. Whether or not a suit is instigated is nothing more than a business decision. The fact that such decisions are made for valid business reasons seems to give lie to the implicit notion that antitrust laws are bad for business. In reality, antitrust laws are only bad for businesses that violate them.

The National Association of Attorneys General also opposes the Administration's proposal for cutting back on the justifiably severe rule of joint and several liability for antitrust conspirators.

Members of this committee know that this is but the most recent attempt to alter this rule. Whether the proposed relief has taken the form of contribution legislation, individual treble damage responsibility or as here, claim reduction, the proponents have always been the same, price-fixers and their attorneys. The rule has its clearest and most frequent application in multi-defendant price-fixing and bid-rigging cases. This legislation would therefore benefit those who have committed the most serious violation of the antitrust laws; it is legislation that is detrimental to injured states, taxpayers, businesses and consumers.

This legislation accepts the proposition that it is fair to limit the liability of antitrust violators and thereby to restrict the ability of victims of price-fixing conspiracies to obtain restitution for their injuries. To the contrary, it is only fair that those victims be fully compensated, that the perpetrators of those injuries pay the penalty for their conspiratorial conduct and that others who may be tempted to participate in a price-fixing conspiracy be deterred from such participation.

The States are aggressively attempting to recover damages for themselves as a result of bid rigging and to protect their citizens by seeking restitution in parens patriae cases. It is for this reason that in 1982, the National Association of Attorneys General unanimously adopted a resolution opposing any alteration of the rule imposing joint and several liability upon antitrust violators. No circumstances exist today that alter that position or require passage of this ill-conceived measure.

The last feature of the remedies bill which I will comment upon would provide attorneys fees for prevailing defendants under certain circumstances. NAAG has not previously taken a position on this issue, but I personally support this measure if and only if it is amended to provide attorneys fees for prevailing defendants in cases judged to be "frivolous" or maintained "in bad faith." This measure would completely address the only serious concern raised by the Administration when introducing this bill, which is the potential coercion of an innocent defendant to settle a frivolous lawsuit because of the great expense of defending it to judgment.

My colleague and I will be pleased to answer any questions you may have. Thank you.

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April 14, 1986

Honorable Strom Thurmond
Chairman
Committee On The Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 2162, the Antitrust Remedies Improvements
Act of 1986

Dear Senator Thurmond:

The following are Attorney General Robert Abrams responses to the questions posed by you and Senator Metzenbaum in your letter dated March 24, 1986.

SENATOR THURMOND'S QUESTIONS

1. Question: I would like to ask our panel about the origins of the treble damage remedy for antitrust violations. Why were treble damages considered appropriate for these kinds of torts but not for others, and what validity do you think is left in those reasons?

Answer: Multiple damages for certain kinds of illegal conduct has ancient and well established roots. The earliest provision in English law was the statute of Gloucester, [1278] 6 Edw. I (treble damages in waste). Modern antitrust statutes had their origin in the Statute Against Monopolies, [1624] 21 James I, c. 3, Section 4 of which authorized treble damages for those injured by unlawful monopolies. Parliament recognized that it was "one thing to pass statutes and ... quite another then to insure that [they were] actually enforced." IV *W. Holdsworth, A History of English Law* at 355 (3d ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in *seeing that a statute was enforced* ...." *Id*. It was also an idea found in early colonial laws. *See e.g.*, *The Laws and Liberties of Massachusetts* at 5 (pilfering and theft: treble damages), 24 (gaming: treble damages) (1648). In turn, the ideal of multiple damages for various kinds of wrongs was a characteristic feature of Roman law. The "delict" of theft ran back at least to the Twelve Tables (450 B.C.). *The Institutes of Gaius* (Part I) (Text with Critical Notes and Translation by F. de Zulueta) at 217 (1958). "[T]he penalty ... [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was "double." *A. Watson, The Law of the Ancient Romans* at 76 (1970). Extortion was remedied by four times the loss. *Id.* at 80. Possession of stolen property was remedied by three times the value of the property. *Id.* at 77. Greek law provided for double damage if stolen property was recovered; tenfold damages otherwise. IV *C. Kennedy, The Orations of Demosthenes*, app. VI at 187 (1909) (quoting a law of Solon). Biblicial law, too, reflected multiple damage recovery. *Exodus* 22:1 (theft of ox or sheep, if killed, restoration of five for ox and four for sheep); *Exodus* 22:9 (trespass to property double damages); II *Samuel* 12:1-6 (restoration of fourfold for taking of lamb).

Modern economic analysis supports the wisdom of multiple damages for certain types of antisocial conduct. *See generally*, R. Posner, *Economic Analysis of Law* § 7.2 (2d ed 1977). Professor (now judge) Posner argues for private enforcement mechanisms of more than actual damages against anti-social conduct, particularly where the factor of concealment is present. *Id.* at 462 (private enforcement); 143, 272 (more than actual damages for deliberate conduct); 235 (concealment). Authorizing the recovery of only actual damages for deliberate anti-social conduct engaged in for profit lets the perpetrator know that if he is caught, he will only have to give the gain back. If he is not, he may keep it; and even if he is sued, he may be able to defeat part of the damage claim or be able to compromise it. The balance of economic risk under traditional single damage recovery, in short, gives few economic incentives to those who engage in such conduct. *See* R. Posner, *Antitrust Law: An Economic Perspective* at 223 (1976). As the Court in *American National Bank and Trust Co. of Chicago v. Haroco* 747 F.2d 384 (7th Cir. 1984) noted in discussing the RICO treble damage remedy which was deliberately copied from the successful antitrust model, delays, expenses and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls. Similarly, studies under the antitrust statute show that most treble damage suits are now settled at close to actual damages. *Study of the Antitrust Treble Damage Remedy*, Serial No. 8, Committee on the Judiciary, House of Representatives, 98th Cong., 2d Session at 14 (1984).

Treble damages were adopted by Congress in the antitrust laws in accordance with the notion that multiple damages would produce better enforcement of the law and the Congressional sense that antitrust violations represented antisocial conduct more serious than garden variety torts. Congressional widsom in this threshhold decision has been frequently endorsed by the Supreme Court and subsequent Congresses and state legislatures.

Reviewing the successful history of the antitrust laws the Court has described the laws as the "Magna Carta of free enterprise" and "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1970). The Court has reaffirmed this judgment of history as recently as 1980. *California Retail Liquor Dealers Ass'n., v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980). Therefore, any analogy to other torts is inapposite, inappropriate, and fails to reckon with the fundamental role antitrust has played in the fostering and preservation of economic freedom.

When Congress enacted the RICO law in 1970 it borrowed treble damages and many other features of the antitrust laws because the laws had been so successful in serving their purpose of deterring and punishing serious antisocial behavior.

Following the lead of Congress more than 40 states have now adopted antitrust laws which incorporate a treble damage remedy. It should also be noted that detrebling might simply channel plaintiffs into state courts.

The reasons which motivated the initial Congressional adoption of treble damages and the subsequent adoption of treble damages by most states are no less valid today. Unreasonable restraints of trade pose the same danger to economic and political freedom that they did in 1890. The documented movement of organized crime into so-called "legitimate businesses" makes these laws and multiple damages even more important today than when initially adopted. Organized crime's usual pattern for conducting formerly legitimate businesses involves restraining normal market mechanisms to extort monopoly profit. Today more than ever strong antitrust laws with credible multiple damage deterrents are needed to maintain a vital free enterprise system.

2. Question: Do you think that the originators of treble damages anticipated that they would create incentives for abusive suits by competitors and for what has been described as "Blackmail by Plaintiffs"? What changes have taken place since treble damages were created to cause such abuses?

Answer: Treble damages have not created the incentive for abusive suits. Treble damages may only be awarded when a plaintiff has proven its case in a field of litigation where it is difficult, costly and time consuming to do so. In such a suit, where a plaintiff has been successful, abuse is a non-sequitir. Abusive suits are those which are filed in hopes of coercing a settlement from an innocent defendant who cannot afford the costs of defending a costly, time-consuming, yet frivolous suit to judgment. A complete remedy for such abuse is to award attorneys fees and costs to defendants in cases which are frivolous or maintained in "bad faith". I have previously endorsed such a remedy in my written and oral testimony.

3. Question: In your view, does the administration proposal retain an effective threat of treble damage liability for all antitrust violations that are currently per se illegal?

Answer: The question embodies an incorrect notion about the nature of antitrust violations. There are no "rule of reason" violations and per se violations in the sense that the latter are more serious than the former. The "rule of reason" and per se labels refer to two modes of analyzing whether particular conduct has or is likely to unreasonably restrain trade. The per se method of analysis is merely a special application of the "rule of reason" which Courts adopt after experience with a particular type of restraint leads them to conclude that exhaustive economic analysis is unnecessary to find that an unreasonable restraint is involved. In truth, there are no hard and fast lines and certain conduct such as horizontal price-fixing, which is usually considered appropriate for per se analysis, has at times instead been subjected to rule of reason analysis.

Once either method of analysis is applied, the Court's judgment for the plaintiff or the government has the same meaning, i.e., that trade and commerce has been unreasonably restrained. The method of analysis utilized to reach that judgment cannot be said to signify that one restraint is more or less harmful than another. In fact, a judgment of violation rendered after "rule of reason" analysis is more certain to produce the result intended by the law. In certain circumstances per se analysis may in fact condemn conduct which has produced desirable effects. Under rule of reason analysis all economic factors are weighed and all potential pro-competitive and anticompetitive effects are examined prior to judgment. A judgment of violation cannot be the product of mechanical application of the law.

Examination of various restraints will show that the per se - "rule of reason" dichotomy is relevant only to the method of analysis and not to the harm which flows from a given restraint.

As an example, consider a market in which 50 distributors, one located in each state compete throughout the country to sell a particular brand of camera to retailers. If the distributors agree among themselves to restrict their sales to the state where they are located, their activity is a horizontal market allocation scheme subject to per se analysis. Consider the same market where the manufacturer of the camera has vertically restrained the 50 distributors previously competing and granted them each an exclusive territorial monopoly for the distribution of the camera within their state of domicile. This vertical restraint of trade is subject to "rule of reason" analysis.

In each instance the market will look the same both before and after the restraint. In each case vigorous intra-brand competition will have been eliminated. In each case there is the possibility that the elimination of intra-brand competition will be offset by a pro-competitive effect in the interbrand market. Per se analysis will exclude the possibility that this interbrand effect will be considered. A violation will be found. Rule of reason analysis will consider any and all effects, and if a pro-competitive interbrand effect of equal or greater magnitude than the intrabrand effect exists, no violation will be found. However, if no countervailing interbrand effect is found a violation will be found. The rule of reason analysis will lead to a determination one way or another which is more secure and the result of an exhaustive analysis of all economic factors. The "rule of reason" result is a more definitive judgment than that arrived at through per se analysis that a serious harmful restraint of trade has occured. Therefore, to treat restraints of trade which have been adjudged violations after "rule of reason" analysis less severely than restraints analyzed under per se analysis is not only illogical and unwarranted but fails to grasp the fact that the former violations are characteristically more rather than less unequivocally anticompetitive.

Having addressed the fallacy implicit in any general assertion that restraints subject to "rule of reason" analysis warrant less severe treatment when a violation has been adjudged, I will proceed to the Chairman's question concerning continued treble damage availability for restraints currently subject to per se analysis.

The answer is no. Generally, because the bill makes the availability of treble damages depend upon the plaintiff asserting that he was "overcharged" or "underpaid", the availability of treble damages for any violation will depend upon the ultimate interpretive consensus of the Courts, as to what those terms actually mean and the standing of a particular overcharged or overpaid party to assert a claim under the antitrust laws.

For example, under current law, a consumer who purchases a product at a price fixed pursuant to an illegal resale price maintenance agreement currently can recover treble damages from either the retailer who sold him the product or the manufacturer who agreed with retailers what the resale price would be. I am not sure whether a consumer could recover from the manufacturer under the proposed law. Although I would argue that the consumer was "overcharged," one might interpret the law as limiting the consumers treble damage redress to those who had "overcharged" him. I would argue against this interpretation just as surely as the manufacturer's attorney would argue for it.

The bill might prevent the recovery of treble damages by certain parties with standing to assert antitrust injuries flowing from tying arrangements, group boycotts or concerted refusals to deal. In certain circumstances these restraints are subject to per se analysis. With respect to tying, consider an arrangement by a manufacturer of photocopiers with market power who ties-in paper. The consumer purchases the paper despite the fact that he would prefer to purchase paper from company Y which is the same price but which he believes to be of superior quality. There are two victims with standing to sue company X, the consumer and company Y. Neither can recover treble damages.

The victims of those group boycotts and concerted refusals to deal which are subject to per se analysis will be unable to recover treble damages. For example, if cinema owners with market power collectively refuse to exhibit the films of a particular production company - it would appear that the company would be left without a treble damage remedy.

Even the victims of a hard-core market allocation scheme, which many practitioners and economists believe asphyxiates competition more completely than price fixing, may face increased difficulty recovering treble damages under an "overcharge" standard in comparison to the current standards which would permit damage to be measured in ways other than overcharge, such as lost profits to the victim.

4. Question: Professor Turner has pointed out two areas in which the coverage of the "overcharge" category of violations may not be clear (such as where the injury is caused by something other than a higher price). Are there any other types of violations for which it is unclear how this de-trebling proposal will apply?

Answer: I would restate my answer to the previous question.

5. Question: We have heard testimony in other hearings about "risk analysis" -- that is, how businessmen may try to calculate the possible penalties for engaging in antitrust violations, compare the pay-off from such conduct, and then decide whether to violate antitrust law. In your view, is there any validity to this description of business decision-making, and if so, how would reducing damages affect deterrence?

Answer: The proponents of the bill and I agree that decisions about engaging in conduct which does or may violate the antitrust laws are made in a rational fashion by business according to principles of risk analysis. Indeed the administration's argument is that the availability of treble damages has had such a strong deterrent effect that it has over-deterred conduct which is potentially pro-competitive. I disagree with this second point of view.

I will briefly address these two issues.

First, violations of the antitrust laws are volitional crimes of the sort which are more susceptible to profitability analysis than are other types of crime. Let us not forget that violations of the antitrust laws are crimes merely because we are focusing on civil remedies. The decision to violate the antitrust laws is like many other business decisions. It relies on a formula which takes into account profitability of detection and the likely consequences of the outcome of all enforcement activities -- public and private. The prospect of complete future disgorgement is no small factor in the equation. The notion that single damages coupled with prejudgment interest will accomplish this is misguided. It proceeds on the assumptions that detection will occur at a time when the totality of the injury falls within the statute of limitations and that the entire universe of potential plaintiffs will recover their entitlement. There is no empirical support for these suppositions. Furthermore, the benefits derived from an antitrust violation are not always subsumed within the concept of antitrust damages.

Apparently lost in the shuffle of the explanatory materials produced along with the remedies bill is the idea of compensation for the injury sustained by reason of the violation. For the same reasons that treble damages tend more toward total disgorgement of illegal profits, they also better compensate the victims than single damages could, with or without interest. If we as a society have to make a choice between slightly over-compensating a victim of crime or slightly over-enriching the violator, it is difficult to find any reasoned policy basis for favoring the violator over the victim. The demonstrable loss cognizable under the antitrust laws may be small. However, the real world loss to the victim may be substantially greater. The investment or expansion opportunity which was lost by reason of the violator's possession of the cash necessary for it may never come again. Who compensates the business for the opportunity that he had to forego because he was the victim of the violator's scheme? Single damges, even with interest, won't. Treble damages might. The probability that such consequences will and do follow from antitrust violations is sufficiently certain to warrant the election of the remedy which satisfies the likely harms. To make such opportunity losses a part of the affirmative damage proofs would serve no purpose other than the creation of a complex side show in an already complex litigative process.

Second, the Administration acknowledges the deterrent effect which treble damages have and, in fact, argues that the remedy has over-deterred potentially pro-competitive conduct. This assertion is not only demonstrably false on empirical grounds but rests on a value judgment about the underlying behavior which finds no basis in the law or in Supreme Court interpretations of the law.

It cannot be seriously contended that the current law has had any in terrorem effect on mergers or the adoption of vertical restraints. Our nation is experiencing an unparalleled wave of mega-mergers. Vertical restraints are ubiquitous and were so even during the period prior to the 1977 Sylvania decision when they were subject to per se analysis. A prime example is the malt beverage industry, where all the major brewers recently adopted air-tight exclusive distribution agreements in the face of current law and the firm ideological opposition of the Antitrust Division, the FTC and the National Association of Attorneys General.

It is clear that even current law has not sufficiently deterred this type of highly anticompetitive conduct because the difficult, lengthy and costly process of proving a rule of reason violation gives firms the incentive to restrain trade now and then stall in the courts for years.

The Administration's real dissatisfaction is with substantive antitrust law and its interpretation by the Courts. For example, the Antitrust Division has clearly called for a presumption of per se legality subject to rebuttal for all vertical restraints of trade. Under their view of the law, intrabrand competition is worthless and a vertical restraint is harmful only if it facilitates collusive horizontal activity. In an analogous manner, the Division treats Section 7 of the Clayton Act as a nullity. Furthermore, by restricting its merger analysis to an inquiry into demonstrated "market power" , and by defining "market power" as approaching "monopoly power", Clayton Section 7 has become nothing more than an adjunct to Sherman Act Section 2. The Supreme Court has bought none of this.

The Administration's claim that potentially pro-competitive conduct is being over-deterred incorporates its own rejected notions of what is pro-competitive and what are "harmless" restraints of trade.

Although the Georgetown Study has yet to produce many firm conclusions, some of the participants stated that alteration of the treble damage remedy was inferior to changing substantive rules concerning violations, if that in fact was the goal. The Administration has chosen the least appropriate manner for foisting its rejected theories of competition on the American public.

6. Question: One of the purposes of this proposal is to reduce the incentive for competitors to file groundless antitrust suits. Is there any evidence to show the magnitude of the problem caused by frivolous antitrust suits filed by competitors (such as the percentage of antitrust suits)?

Answer: The only measure proposed which is rationally related to the goal of discouraging groundless antitrust suits is the provision for attorneys fees and costs to prevailing defendants in certain circumstances. I support this proposal if the standard adopted is "frivolous" lawsuits and suits "filed or maintained" in bad faith. I am not convinced that this is a problem of great magnitude. There is, however, clear empirical proof that there has been a drastic reduction in the number of private antitrust cases filed in recent years.

SENATOR METZENBAUM'S QUESTIONS

1. Question: Does the treble damage remedy deter anticompetitive conduct such as price-fixing?

2. Are most business executives aware of the potential for treble damages?

Answer to Questions 1 and 2:

The Administration as well as both supporters and critics of the Administration's reform package all agree that the treble damage remedy is a strong deterrent to anticompetitive conduct, such as price-fixing, and that business executives are aware of the existence of treble damages. The Antitrust Division has asserted that the paucity of national price-fixing cases prosecuted by the Division in the 80's, which contrasts with many such cases in the 70's, is due to the strong deterrent effect of the antitrust laws.

In fact, the proponents of the Remedies Bill assert that treble damages have overdeterred potentially pro-competitive conduct. I have responded to this demonstrably false assertion in my answer to Senator Thurmond's question No. 5 herein.

3. Question: Did the Georgetown Study clearly conduct that treble damages are inappropriate in some cases or were the results less certain?

Answer: The Georgetown Study did not clearly conclude that treble damages were inappropriate in some cases. In fact, there is very little beyond the raw data emanating from the study which can be characterized as conclusive. The clearest conclusion responsive to this question is found in a paper emanating from the Georgetown Study entitled "Private Antitrust Litigation: An Introduction and Framework" authored by Steven C. Salop of the Georgetown Law Center and Lawrence J. White of New York University Graduate School of Business Administration ("Salop and White"). In this paper the authors observe that the proponents of detrebling are in fact unhappy about Court interpretations of the antitrust laws in areas such as vertical restraints, predatory pricing, tying arrangements, full-line forcing, exclusive dealing and price discrimination and are seeking detrebling for violations which they have failed to convince the Courts should not be violations at all. With respect to such issues of the proper substantive rules of antitrust law, the authors conclude that it is preferable to change the substantive rules, if that is warranted, rather than detreble or change standing rules. See "Salop and White" Page 68 and note 88.

4. Question: What do you think of the Administration's proposal to reduce the plaintiff's claim by the market share of the settling party? Doesn't that raise the possibility of a lengthy dispute over the relevant market and market shares that does not now exist?

Answer: I oppose this proposal and the National Association of Attorneys General, whose Antitrust Committee I chair, also oppose this or any other provision which would reduce the full force of the justifiably severe rule of joint and several liability for antitrust conspirators. The rule of joint and several liability has its clearest and most frequent application in multi-defendant price-fixing and bid-rigging cases. It would severely reduce the incentive for state attorneys general and other private parties to settle actions with certain defendants for testimony. It would promote conspiratorial discipline and honor among thieves and retard the process of settling meritorious claims against the worst antitrust offenders.

5. Question: What are some of the particular problems that the Administration's bill would cause for you as the person entrusted to enforce antitrust laws at the state level?

Answer: As indicated in my response to the immediately preceding question, the claims reduction provision of the remedies bill would discourage the settlement of meritorious proprietary claims of the state and parens patriae claims in price-fixing, bid-rigging, and market allocation cases. It would effectively reduce the State's ability to prove these cases through testimony bartered for early modest monetary settlements. It would increase the cost and length of litigation considerably.

The State which litigates in a proprietary capacity for itself and its political entities and as parens patriae for its natural person consumers would be harmed in the same manner that any private party will be. I have detailed in my response to Senator Thurmond's Question No. 2 many of the ways that private parties will be adversely affected by the detrebling provisions of the bill. Some of these adverse effects are germane to the State as well in its proprietary and parens patriae roles.

The most severe effect that these provisions would have on the state attorney general would flow from the diminution of deterrence and incentives for private enforcement of the antitrust laws. By reducing the deterrent for violating the laws, the Remedies Bill would encourage violations which will overmatch scarce state resources already inadequate to deal with the void in antitrust enforcement created by the current federal policy of lax enforcement in certain areas and active hostility to antitrust enforcement in others. By discouraging private enforcement in the form of litigation and voluntary avoidance of violations, the proposals will further exacerbate the strain on the scarce resources for enforcement at the state level.

6. Question: What is your opinion of the remedies provisions in S.2022, the legislation I have introduced, for example:
-- The consumer redress provisions allowing State AG's, the FTC and Justice to sue for damages for consumers.

Answer: I believe that the State Attorney General is the appropriate parens patriae representative for the consumers ... in a state. Investing the current Administration with parens patriae powers would create the possibility of resale price maintenance and tying suits for consumers where the government is urging the Court to analyze the arrangement under a "rule of reason" rather than "per se" standard. However, beyond the predelictions of this Administration, I believe that a State Attorney General is best situated to vindicate these interests for the consumers in his or her state. I would only deem it appropriate for the F.T.C. or Antitrust Division to exercise parens patriae authority where a State Attorney General is unable because of resources or unwilling to represent consumers in parens patriae cases.

-- The provision allowing State AG's access to premerger filings.

Answer: I support this provision which is consistent with our position in the Mattox and Liberman cases.

-- The provision providing for prejudgment interest in all cases.

Answer: I support this provision. The longevity of antitrust cases makes the ultimate award of treble damages, in the few cases where that occurs, with significantly less than Congress intended when it enacted the remedy.

-- The provision requiring that acceptable divestitures be arranged before a merger is approved and that a divestiture fully restore competition lost from a merger.

Answer: The National Association of Attorneys General whose Antitrust Committee I chair has previously adopted a position consistent with this proposal.

Question 7. What other changes would you like to see in the antitrust laws? Are there remedy provisions that should be strengthened rather than weakened as the administration proposes?

Answer: A top legislative priority for NAAG since 1977 has been legislation which would overrule the Illinois Brick decision. Senator Metzenbaum's bill contains one approach to this problem which merits serious consideration.

Very truly yours,

LLOYD CONSTANTINE

For: ATTORNEY GENERAL ROBERT ABRAMS

cc: Honorable Howard Metzenbaum

The **Chairman**. Judge Renfrew, we would be glad to hear from you now.

STATEMENT OF CHARLES B. RENFREW

Mr. **Renfrew**. Thank you, Mr. Chairman.

My prepared statement deals with each of the provisions of the proposed legislation, and what I would like to do this morning is restrict my testimony to the selective detrebling provision.

I think it is fairly well-agreed that there are really three purposes served by the trebling of the private damage award:

One, to punish the violator;

Two, to deter misconduct; and

Three, to compensate the victim.

What I would like to do is try and analyze the impact of selective detrebling upon each of those three purposes.

First, as to the punishment, clearly, there is going to be no change imposed upon the type of case involving price fixing, bid rigging, and the like.

What this selective detrebling does is bring in an element of fairness, which has heretofore not been available in the antitrust remedies. And I say fairness because I think it is fundamentally unfair for one who believes in good faith that their conduct is in compliance with the antitrust laws to receive punitive treble damages.

I think my copanelist, Mr. Turner, put it best in his treatise with Phillip Areeda, which is, I think, the seminal work in the field of antitrust, when he wrote that:

> The common law's usual discomfort with imposing unforeseen liability is greatly exasperated when compensatory damages are automatically trebled. A defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially, or that the laws had changed in the meantime.

Mr. Turner just mentioned, for example, earlier in his remarks of per se cases not always being as clear as they might be.

I would like to refer just to three Supreme Court decisions which were held to be per se violations which changed the law in the very case before them. The first is *United States* v. *Topco,* where certain customer restrictions were held to be per se violations which before had been held reasonable under the test of the rule of reason.

The second is *United States* v. *Schwinn.* There, certain customer restrictions were held to be per se violations, and that very court had held in *United States* v. *White Motor* that such restrictions were lawful. Of course, the *Schwinn* case was reversed itself in GTE Sylvania.

And then, in *Simpson* v. *Union Oil Company,* the Supreme Court held that certain consignment contracts were per se unlawful although they had previously been upheld.

I think one of the real problems is there is an understanding afoot that somehow all antitrust violations are intentional acts. That simply is not the case. Antitrust violations are not always intentional acts, not even in the field of price fixing.

Let me give you an example. In 1969, following the decision in the *Container Corporation* case, many businessmen followed the practice of verifying their competitors' prices to avoid a Robinson-Patman Act violation. That very practice was upheld by my circuit, the ninth circuit, in *Gray* v. *Schell.* It was upheld by the tenth circuit in *Belliston* v. *Texaco.* But then, when the issue got before the Supreme Court again in *United States Gypsum,* that conduct was held to be unlawful. But in that very case, *United States Gypsum,* the Supreme Court was very careful to point out that intent was only an element in a criminal violation; that you could have a civil antitrust violation where you only had anticompetitive effect; you did not have to have an anticompetitive purpose.

Now, as to the second element, deterrence, as a former sentencing judge, in my view, a great deal more is said about deterrence than is actually known about it.

To try to predict behavior responsives and human motivation as if they were somehow fit subjects for measurement or examination, I think is questionable. We have a model. We have been given a model today. It is the profit-maximizing, rational risktaker. But I wonder whether that tells us everything we really need to know about human behavior.

Now, deterrence is a two-way street. You can deter competitively beneficial conduct as well as deter competitively helpful or harmful conduct. And the Supreme Court in the *United States Gypsum* case was careful to point out that the customer, the consumer, can be hurt if we deter by overdeterrence competitively helpful conduct. And I think we have to be very careful. I think a balance has been struck in this particular legislation.

And now the last purpose, the one about the relief, the compensation of the victim. I think clearly this is the most important function of the private action.

The Supreme Court in the American Society of Mechanical Engineers said the primary purpose of the private action is to provide a remedy for the injured party. And I think here we have to be very careful indeed to make sure that the private party has both the ability and the incentive to bring actions. The legislative history and the judicial decisions are clear that this is an important part of our antitrust enforcement.

Indeed today, as Senator Metzenbaum questioned, we know that private enforcement is far greater in numbers than Government enforcement. I think for the first 50 years, there was an even balance between Government enforcement and then private enforcement in terms of the number of cases. Since then, the scales have gone far heavily in favor of the private action. In the last several decades, there were probably more than 10-to-1 private actions filed than Government actions.

Those cases that are the most difficult to detect, the most expensive to bring, are those nationwide price fixing and bid rigging cases where there still will be the treble damage remedy. The type of cases that we are talking about here, about the selective detrebling, are those where a competitor is hurt. He generally knows who hurt him and how, and he will be fully compensated: His actual damages, interest from the date of the offense, plus attorneys' fees.

I think that a balance here has been very good. Experience in other areas has shown that the absence of the trebling, the punitive trebling, has not foreclosed cases. Securities cases, most commercial cases, do not have the windfall trebling, they do not have the plaintiff's attorneys' fees. And yet those cases have no absence of plaintiffs or lawyers prosecuting them. So I think that what we have here is an effort—and I agree with Mr. Turner on how this is phrased is difficult, but the clarity here has to be a very imortant part.

I think that this body is perhaps as good as any in the country to do the necessary balancing between ensuring the ability and the incentive of private antitrust plaintiffs to bring actions, on the one hand, and the public interest in ensuring procompetitive activity on the other.

Selective detrebling has been done before. In 1980, it was done in cases involving foreign sovereigns. In 1982, it was done in cases with export trading companies. In 1984, it was done in cases involving research and development joint ventures. And I think in 1986, it can be done with the formula that the administration is proposing. Thank you.

[Prepared statement and responses to questions follow:]

Prepared Testimony of Charles B. Renfrew
before the
United States Senate Committee on the Judiciary

My name is Charles B. Renfrew. I am Vice President, Law and a Director of Chevron Corporation. I am appearing here in support of the "Antitrust Remedies Improvements Act of 1986." The most significant features of that legislation would (a) limit the types of cases in which a court is required automatically to treble a private award of damages under the antitrust laws, (b) permit the award of attorneys' fees to the defendant in an antitrust case if the court finds that plaintiff's conduct in bringing or prosecuting the suit was "frivolous, unreasonable, without foundation or in bad faith," and (c) apportion liability among the defendants in those situations in which more than one defendant in an antitrust case was jointly responsible for the plaintiff's injury by reducing any ultimate judgment by an amount "fairly allocable" to any defendant which had settled.[1]

In my view, these are worthy and desirable changes. Treble damage litigation, while well-intentioned and in many cases fully justified, has also been subject to enormous and costly abuses. Further, the penalty aspects associated with trebling a damage award are simply inappropriate for many of the situations to which the remedy is currently applied. The legislation addresses both of these problems without any impairment of the capabilities or incentives of plaintiffs to bring legitimate antitrust suits, and without any dilution of the salutary and beneficial results of private antitrust enforcement.

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[1] Other provisions providing for prejudgment interest and placing damage recoveries by the United States on an equal footing with those by private parties are relatively non-controversial and require nothing more than mention here.

Title II - Detrebling

Under current law, with few exceptions, all private damage awards under the antitrust laws are automatically trebled, irrespective of the degree of culpability of the defendant, its level of participation in an unlawful endeavor, or the size of the untrebled award.[2] Title II would eliminate this generalized use of trebling, but would preserve trebling in cases where the plaintiff seeks to recover an "overcharge or an undercharge." That means that trebling would be retained in virtually all situations alleging conspiratorial price-fixing, market division and bid-rigging, the types of cases which exhibit the most socially offensive conduct and those in which the public interest in detection and prosecution is highest. Title II would also provide for prejudgment interest running from the earliest date of an antitrust injury, thereby assuring that a plaintiff who is confined to single damages is still made whole.[3]

I favor the enactment of Title II, because it is fundamentally unfair to impose the penalty which trebling reflects--often a very large penalty--in cases where the defendant believed it was acting lawfully,[4] and in ordinary commercial disputes of the type which arise in a distributorship termination or under the Robinson-Patman Act. These latter cases, particularly, operate principally to settle scores between private litigants and rarely serve any separate public purpose. Accordingly, there is no compelling reason for giving to plaintiffs and their lawyers the windfall which accompanies trebling.

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[2] Recent legislation has limited antitrust recovery to actual damages in three narrow areas: actions by foreign states (15 U.S.C. § 15(b), Act of December 29, 1982, Public Law 97-393), actions based on export activities protected by the Export Trading Act of 1982 (15 U.S.C. § 4016, Public Law 97-290, enacted Oct. 8, 1982), and actions based on conduct within the scope of a joint research and development venture under the National Cooperative Research Act of 1984 (15 U.S.C. § 4303(a), Public Law 98-462, enacted Oct. 11, 1984) are each excluded from automatic trebling.

[3] Prejudgment interest is presently available on the damage award before trebling, only if the plaintiff can show that the defendant intentionally delayed the proceeding (see 15 U.S.C. § 15(a)).

Opponents of the legislation will argue that automatic trebling is needed, because some conspiracies are never disclosed and therefore go without any redress at all. I question whether trebling can be justified on this basis, in view of the well-established doctrine of fraudulent concealment. Courts have held time and again that where a conspiracy has been "concealed," the four-year statute of limitations is tolled and plaintiffs are permitted to seek damages for earlier periods.[5] In any event, Title II accommodates the argument in major part by retaining the trebling feature for all "overcharge and undercharge" cases, thereby preserving the current rule in the vast majority of cases where a conspiracy might be expected to remain secret.

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[4] The law is replete with situations in which conduct was held to be a violation of the antitrust laws, subjecting the defendant to automatic treble damages on behalf of anyone injured by the conduct, even though the very same conduct had previously been held lawful. In *United States* v. *Topco Associates, Inc*. (1972) 405 U.S. 596, the Supreme Court applied a per se rule to customer restrictions that previously had been tested under a rule of reason and upheld. In *United States* v. *Arnold, Schwinn & Co*. (1967) 388 U.S. 365, the Supreme Court applied a per se rule to territorial restrictions that the Court itself had previously upheld in *White Motor Co*. v. *United States* (1963) 372 U.S. 253. In *Simpson* v. *Union Oil Co*. (1964) 377 U.S. 13, the Supreme Court applied a per se rule to certain types of consignment arrangements which previously had been upheld.

[5] In *Westinghouse Elec. Corp*. v. *City of Burlington* (D.C.Cir. 1963) 326 F.2d 691, the District of Columbia Circuit held in a per curiam decision, with Justice Burger (then a Circuit Judge) concurring specially, that the four-year statute of limitations provided in 15 U.S.C. § 15b was tolled by acts of affirmative concealment. Numerous other courts have reached the same result (see, e.g., *ABA Antitrust Section, Antitrust Law Developments* (2d Ed. 1984) pp. 426-430).

Opponents will argue that automatic trebling is needed to encourage potential plaintiffs to undertake the risk and expense of antitrust litigation. I disagree. To begin with, Title II does not affect trebling in the types of cases where a plaintiff's expenses are likely to be greatest, i.e., the large, nationwide price-fixing or bid-rigging cases. Furthermore, it is not true that limiting a plaintiff to single damages will interfere significantly with his incentive to sue. Even in a garden variety distributorship termination case between two parties, the computation of single damages can be significant indeed. In Spray-Rite Service Corp. v. Monsanto Co. (7 Cir. 1982) 684 F.2d 1226, affirmed (1984) 465 U.S. 752, for example, a distributor was awarded $3.5 million, before trebling. And some antitrust cases have produced very large awards. In Litton Systems, Inc. v. American Tel. & Tel. Co. (2 Cir. 1983) 700 F.2d 785, for example, a private monopolization case, the plaintiff was awarded over $90 million before trebling. I should also point out that over and above the damage award itself, the statute permits a successful plaintiff to recover all of its costs of litigation and its attorneys' fees. These, too, add considerable "incentive" for lawyers to handle these cases.[6]

Experience in numerous cases based on other laws tends to confirm these views. The law does not provide for windfall penalties of the type associated with trebling in many labor, securities and personal injury cases, to name just a few examples, yet there is certainly no shortage of plaintiffs willing to bring these lawsuits or lawyers willing to handle them on a contingent fee basis. I respectfully suggest that eliminating trebling under the scheme of Title II will have little or no effect on the ability or incentives of plaintiffs to bring proper cases.

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[6] In Trans World Airlines, Inc. v. Hughes (S.D.N.Y. 1970) 312 F.Supp. 478, 485, affirmed (2 Cir. 1971) 449 F.2d 51, reversed on other grounds (1973) 409 U.S. 363, the court awarded $7.5 million in attorneys' fees alone. In Pacific Coast Agricultural Export Assn. v. Sunkist Growers (N.D.Cal. 1973) 1973-1 CCH Trade Cas. ¶ 74,523, pp. 94,344-94,345, affirmed (9 Cir. 1975) 526 F.2d 1196, certiorari denied (1976) 425 U.S. 959, the court awarded $200,000 in attorneys' fees, including $22,500 for legal assistants' time. Fees incurred on appeal are also recoverable (Perkins v. Standard Oil Co. (1970) 399 U.S. 222).

Opponents of the legislation may argue that trebling enhances the value of the "private attorney-general" as a deterrent to unlawful behavior. There is no question that the threat of civil litigation is one factor which tends to promote compliance with the antitrust laws, but I question whether the trebling feature adds much deterrence, over and above that already achieved by the criminal and civil penalties available to the federal government, by the penalties available to many state governments, and by the availability of single damages which include both costs and attorneys' fees. Deterrence arises in litigation from its overall cost, the business disruption it imposes, and the stigma carried by allegations of criminal behavior, not from the prospect of "trebling" an award many years down the road. I am unaware of any situation where, because of the trebling of a civil award, business people consciously decided to forego unlawful activity which without the trebling they would have otherwise undertaken, and I doubt seriously whether such a case exists.

Furthermore, while most of us would agree that deterrence of unlawful behavior is a worthwhile objective, we must also recognize that limitless exposure to liability may deter desirable, pro-competitive behavior, simply from an overabundance of caution. The huge treble damage awards of recent years, based on price-fixing theories, have undoubtedly made some businesses reluctant--on advice of counsel--to mimic the pricing of their competitors even though that might have been their most aggressive and competitive move. In United States v. United States Gypsum Co. (1978) 438 U.S. 422, the Supreme Court noted this problem of "over-deterrence" as follows:

> "[There exists] the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment" (438 U.S. 441).

In a footnote, the Court continued:

> "* * * where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose." (438 U.S 442, n. 17).

Although the Gypsum case arose in the context of strict criminal liability, I believe that the same observations are equally applicable to massive civil liability. It is paradoxical, indeed, when the implementation of antitrust compliance objectives diminishes the vigor of competition.

As a practical matter, the greatest impact of detrebling is likely to be felt in the so-called "vertical restraints" area, i.e., in litigation between manufacturers and distributors with respect to termination situations, price discrimination and claims of unlawful tying and exclusive dealing. Here, trebling serves no useful purpose and imposes costs on the business process that make it less efficient. In my view, these suits are essentially private affairs and are most inappropriate for trebling a damage award.

Every manufacturer who sells products through distributors or dealers is painfully aware that litigation often, if not routinely, follows in situations where a distributor relationship must be terminated. Indeed, it often seems that the more proper and legitimate the business reasons for the termination, the more likely it is that litigation will result. This type of litigation is prompted, in part, because the distributor has little to lose commercially through suing, but more importantly, because treble damages (plus costs and attorneys' fees) make it extremely attractive for lawyers to take these cases on a contingent fee basis.

From the perspective of a defendant, these factors increase the cost of doing business in two ways. First, defendants confronted with the automatic trebling of a potential award, the high cost of litigation and the uncertain state of the law are usually willing to pay substantial sums to settle even the flimsiest cases. Second, and perhaps more important from a cost standpoint, manufacturers are often encouraged by their lawyers to retain even the most inefficient and dishonest distributors, merely to avoid the potential liability and the high cost of litigation.[7]

Title III - Defendant's Attorneys' Fees

Title III would permit prevailing defendants to recover attorneys' fees from plaintiffs and/or their lawyers, where a plaintiff's conduct in bringing or prosecuting a suit was "frivolous, unreasonable, without foundation or in bad faith." I support this change in the law. Virtually every major corporation has had to contend with what Professor Milton Handler once referred to as "legalized blackmail" resulting from the filing of meretricious antitrust litigation, often in the form of a class action on behalf of thousands or millions of purchasers (thus assuring that potential liability will be staggering), brought by lawyers without any real clients and whose principal objective is to coerce a large settlement for their own benefit from a defendant not wishing to undergo the business risk associated with massive liability and the business costs associated with trial preparation for a huge industrywide case.

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[7] The practical difficulties encountered in terminating distributorships is discussed at length by my former partner, Robert P. Taylor, in Von Kalinowski, Antitrust Counselling and Litigation Techniques, Volume 1, Chapter 10 (1985).

In Eisen v. Carlisle & Jacquelin (2 Cir. 1973) 479 F.2d 1005, 1019, the Second Circuit observed:

> "[T]he practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives' claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago."

And numerous courts have criticized the bringing of lawsuits where the principal beneficiaries were the lawyers. In Kline v. Coldwell, Banker & Co. (9 Cir. 1974) 508 F.2d 226, certiorari denied (1975) 421 U.S. 963, an antitrust class action, Judge Duniway noted:

> "The real bonanza in a case like this, if it is won, will go to counsel. * * *
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> * * * * *
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> "I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. * * *
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> "I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust" (508 F.2d 237-238).

Similarly in Cotchett v. Avis Rent-A-Car System, Inc. (S.D.N.Y. 1972) 56 F.R.D. 549, an action seeking to recover a $1 surcharge on automobile rentals, the court refused to certify a class of 1.5 million persons, stating:

> "The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial interest Mr. Cotchett might have in the legal fees engendered by this lawsuit" (56 F.R.D. 554).

And again in In Re Hotel Telephone Charges (9 Cir. 1974) 500 F.2d 86, 91, the court noted:

> "Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute."

Title III addresses this problem, but only in the most narrow and carefully drawn manner. Title III permits defendants to recover their attorneys' fees only where the plaintiff's conduct (or more likely that of his lawyer) is clearly wrongful. As noted, the conduct must be "frivolous, unreasonable, without foundation or in bad faith."

Theoretically, sanctions for the behavior addressed by Title III are presently available under Rules 11 and 37, but as a practical matter, the courts have been hesitant in the past to award sanctions, although there does seem to be an increase in applying sanctions today. Thus, while Title III does not represent a major departure from existing law, its enactment will constitute a clear signal to the judiciary that Congress recognizes and wants to reduce some of the abuses presently found in treble-damage litigation.

Title IV - Claims Reduction

Under current law, each defendant in a damage action based upon a violation of Section 1 of the Sherman Act is held jointly and severally liable for all damages incurred by the plaintiff or a class of plaintiffs, not only for the injury caused by that defendant, but for the injury caused by every other defendant as well. This rule, when coupled with the willingness of courts to certify large nationwide class actions, means that a company can be confronted with liability running into billions of dollars and often exceeding its net worth.[8] Furthermore, a plaintiff is permitted to execute against a single defendant for the full amount of a judgment, and that defendant has no right to compel the other defendants, even defendants which may have been more culpable, to contribute to the payment.[9]

These two rules taken together--joint and several liability leading to very large exposure, and the absence of a right of contribution--permit plaintiffs to coerce unfair settlements by threatening each defendant with the full burden of a nationwide, industrywide claim for an overcharge. This committee has developed, to a point now beyond serious dispute, an enormous factual record showing that the extortion of large settlements from defendants who want to exonerate themselves at trial has reached scandalous proportions.[10] There is no need to repeat all of that here. Suffice it to say that every defendant which finds itself caught up in a major industrywide price-fixing case has strong economic incentives to settle, even though it may be completely innocent.

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[8] Examples are plentiful. In the Corrugated Container litigation (S.D.Tex.) (MDL-310), the court and the parties estimated that liability could be as high as $3 billion. In the Plywood litigation (E.D.La.) (MDL-159), three nonsettling defendants faced liability of $1.5 billion based on a formula approved by the jury. In Bogosian v. Gulf Oil Co., et al. (E.D.Pa., Dkt.Nos. Civ. 71-1137 and 71-2543), the parties estimated liability for settlement discussions at between $3 and $12 billion.

[9] In Texas Industries, Inc. v. Radcliff Materials, Inc. (1981) 451 U.S. 630, the Supreme Court refused to permit an antitrust defendant a right of contribution against other defendants, holding that apportionment of liability should be for Congress, not the courts, to create. Numerous bills have been before Congress in recent years which would have created rights of contribution in antitrust cases. See, e.g., Report of the Committee on the Judiciary on S. 1468, S.Rep.No. 96-428, 96th Congress, 1st Session (1979); Report of the Committee on the Judiciary, United States Senate on S. 995, S.Rep.No. 97-359, 97th Congress, 2d Session (1982); House Monopolies Subcommittee's Staff Report on Contribution Bill in 97th Congress, published Feb. 10, 1983 at 44 ATRR 280 (hereinafter "House Report").

To some extent, the problem of coerced settlements is inherent in the structure of the antitrust remedy. Even where plaintiffs do not overtly take advantage of the disparate bargaining power they enjoy, the coercive impact of existing procedures develops naturally as soon as one defendant decides to settle. Under existing damage calculation rules, when one alleged co-conspirator settles a case, the court is not permitted to reduce any final judgment against the nonsettling defendants by the settling defendants' percentage share of the damages. Instead, the court merely subtracts the straight dollar amount of the settlement from the final, trebled, award.[11] At the very least, this means that whatever portion of the plaintiffs' claim against the settling defendants was compromised by the settlement can now be reasserted against those which have not settled. Moreover, since many settlements in practice take place at a tiny fraction of the actual claim, the subtraction becomes of little or no consequence at all. The reality is that when one defendant begins even to suspect that some or all of the other defendants may settle, there is often a scramble to settle concurrently.

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[10] Starting with S. 390 in the 96th Congress and continuing through S. 1300 in the last Congress, numerous legislative proposals to provide for contribution or to soften the rule of joint and several liability have generated thousands of pages of testimony and documents. Typical of the conclusions drawn, the Senate Report on S. 995 concluded:

> "Laws which are legitimately designed to deter and punish wrongdoers should not be used to permit plaintiffs to settle with a few defendants and then extract * * * proportionately larger payment from other defendants, who would be faced with liabilities well beyond their own market shares" (S.Rep.No. 97-359, p. 2).

The House Report similarly concluded:

> "Existing law * * * does carry some potential for unfairness because of joint and several liability, particularly in the context of large class actions. A relatively small, less culpable defendant could be forced to pay treble damages arising from industry-wide violations that are grossly disproportionate to its conduct" (House Report at 297).

Title IV attempts to deal with these problems through a mechanism referred to as "claims reduction." Basically, the bill provides that where some alleged co-conspirators have settled with the plaintiff, any ultimate judgment against the remaining defendants will be reduced by an amount "fairly allocable" to the settling parties.[12] Assume for purposes of illustration that the plaintiff has a $10 million price-fixing claim (before trebling) against several defendants, and settles for $3 million with defendants representing 60% of the total sales on which the claim is based. Under current law, if the plaintiff prevails at trial on the full amount of his claim, the final judgment would be for $27 million, i.e., $10 million, trebled, less the $3 million paid in settlement. Under Title IV, the final judgment would be only $12 million, i.e., $10 million, less the 60 percent attributable to the settling defendants or $6 million, then trebled. This is a desirable change, because it tends to make each defendant, at least for settlement purposes, responsible only for damages attributable to that defendant. This, in turn, will permit a defendant which wants to go to trial and attempt to exonerate itself to do so.

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[11] See Flintkote v. Lysfjord (9 Cir. 1957) 246 F.2d 368, 398, certiorari denied (1957) 355 U.S. 835; Hydrolevel Corp. v. Am. Soc. of Mech. Engineers (2 Cir. 1980) 635 F.2d 118, 130, affirmed (1982) 456 U.S. 556 ("it was error for the district court to deduct the $800,000 already paid in settlement, from the jury verdict, before trebling the verdict").

[12] Although I support fully the objectives of the bill, the Committee should consider carefully whether the specific language satisfies those objectives. Title IV, for example, appears to require a "release" to trigger its allocation provisions. This may be too narrow to cover other types of settlement transactions, e.g., a covenant not to sue, through which a plaintiff could achieve the same results as are found under present law. Moreover, Title IV appears to have no application where a plaintiff chooses to go to trial and execute on a judgment instead of settle.

The scheme adopted by Title IV for dealing with the problem of sequential settlements is free of many of the criticisms addressed to earlier legislative proposals. A principal argument used to oppose contribution, for example, was a concern that the introduction of cross-claims among defendants would complicate antitrust litigation to a greater extent than already exists (see, e.g., House Report at 289). A key advantage of Title IV over the contribution proposals is that claims reduction does not cast the defendants into adverse roles, vis-a-vis one another, and thus should not add any complexity to antitrust litigation.

And since under Title IV there continues to be joint and several liability, a plaintiff will still be permitted to recover fully on any judgment that is entered, irrespective of the insolvency of one or more defendants.

Chevron Corporation
225 Bush Street, San Francisco, California 94104-4289

Charles B. Renfrew
Director and Vice President

April 7, 1986

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I am pleased to provide the following responses to the questions attached to your letter of March 24, 1986.

Your Question No. 1

The trebling of damages arising from an antitrust violation was first established in 1890 in section 7 of the original Sherman Act. The provision appears to have been adopted with essentially no discussion relevant to the issues currently before the Committee on the Judiciary.* What little reference we do find in the legislative history to the provision for trebling is centered upon giving effective relief to the individual victims of the hated "trusts" in light of the $2,000 jurisdictional limitation applicable to the Federal "circuit courts" of that time. When the Clayton Act was drafted and debated almost twenty-five years later, Congress simply lifted the treble damage provision from the Sherman Act--again without discussion helpful to the concerns of 1986--and incorporated it as section 4.

Despite this surprising lack of legislative history, I think it is doubtful that the authors of that provision could ever have imagined the breadth and scope that post-World War II developments would give to the application of the antitrust laws. The impetus for passage of the Sherman Act in 1890 was the existence of widely perceived predatory practices and cartelization, on a large scale, by individuals publicly denounced as conscienceless "robber barons." In that setting, treble damages must have seemed a most appropriate means for addressing behavior that was both morally reprehensible and economically harmful. Since that time, however, the sweep of the antitrust laws has been greatly expanded, both by Congress and the courts, to apply to a wide variety of trade practices, many arising--as I explained in my prepared testimony--in the ordinary course of everyday business from conduct undertaken in good faith reliance on the advice of counsel that the conduct was lawful.* The Administration proposal represents, at least to a large extent, a carefully drawn effort to limit the extraordinary and punitive aspects of private antitrust relief to the types of acts that inspired the remedy in the first place, i.e., those involving moral turpitude.

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* See Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes, Vol. I, pp. 23, 34, 206-207, 214-215, 258 and 277. Professor George E. Garvey, in his 1984 "Report of Consultant to House Judiciary Committee on his Study of the Treble Damage Remedy," attributes the trebling feature to the Seventeenth Century British Statute of Monopolies (46 ATRR 356, 357).

Your Question No. 2

Again, in spite of the absence of legislative history, I am confident that the subject of "abuse" of the treble damage remedy was given little or no attention at the time the Sherman Act was enacted. We were a far less litigious society in those days, there was no well-established "plaintiffs' bar" as there is today, and the multi-faceted explosion that would take place after 1966 in class action litigation would have been inconceivable to the lawyers and legislators of 1890.* Certainly, those who approved the creation of punitive remedies for violation of the antitrust laws could never have envisioned that treble damage litigation would one day turn into a device that would actually inhibit competition. In today's environment, however, the threat of such litigation based on acts that no businessman would recognize as inherently wrong, and that many economists believe are entirely appropriate, does in fact impair the ability and willingness of domestic companies aggressively to compete.

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* Professors Areeda and Turner have noted with particular clarity the negative consequences of applying treble damages to behavior thought to be lawful:

> "It must be recognized * * * that treble damages can be an embarrassment to antitrust policy in at least three ways. First, the common law's usual discomfort with imposing unforeseen liability is greatly exacerbated when compensatory damages are automatically trebled. A defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially or that the law has changed in the meantime. Second, the availability of damages, and especially of treble damages, can limit the development of antitrust law. Not only may the courts hesitate to punish settled expectations, they may justifiably hesitate to apply the antitrust laws to such situations as blameless monopolies or oligopolies, even though antitrust policy might support equitable remedies alone in those situations. Third, the lure of the treble damage bonanza, especially for lawyers in class actions, tends to trivialize antitrust litigation" (Antitrust Law, Vol. II, p. 150 (1978)).

Your Question No. 3

The Administration proposal does not provide specifically that treble damages will remain available in *per se* cases. But by perpetuating the trebling of "damages sustained by reason of * * * having been overcharged," the proposal does maintain the remedy for the great bulk of *per se* violations that are likely to be harmful to the public, namely those for price fixing, bid rigging, market division and monopolization.

The advantage of the Administration proposal is its ease of application. The courts are not always able to distinguish, on any principled basis, conduct which constitutes a *per se* violation of the antitrust laws from conduct which is subject to a rule of reason analysis. Indeed, the distinction itself is more a rule of judicial convenience than one which inheres in the substantive nature of the law.* To posit the trebling of damages on whether the underlying substantive violation was subject to a per se rule or a rule of reason analysis would create endless litigation over the classification.

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* In addition, numerous procedural rules have developed since 1890, some unique to antitrust litigation, which have interacted with one another to create the problems of massive liability and extorted settlements so familiar to this Committee. Among these are joint and several liability, the absence of contribution, the "slight evidence" rule, and the rule that the burden of proof on the "amount" of damage is less than that on the "fact" of damage. For a general discussion of the interaction of those rules and their combined effect on antitrust defendants, see Littman & Van Buskirk, *The "Dogmas" of Antitrust Actions: A New Perspective*, 25 Antitrust Bull. 687 (1979).

The principal group of cases that are currently dealt with under per se rules and for which trebling would be eliminated under the Administration proposal are the garden variety termination cases, wherein a terminated distributor seeks compensation for injury to his business arguing that the termination occurred because he refused to participate in a vertical price fixing arrangement. Normally these cases do not involve claims for overcharges, so that only single damages would be available.** As I pointed out in my prepared testimony, the abuse of the litigation process by distributors in this situation outweighs any benefit to the public from the bringing of these cases, and the elimination of trebling will be a positive influence.

Your Question No. 4

In my view, the proposal is as clear as a statute could ever be with respect to which awards would continue to be trebled. To me, the term "overcharged or underpaid," as used in Title II, refers to a sales transaction which occurred at a price which--but for the antitrust violation--would have occurred at a different price. Overcharge is commonly used as the measure of damages in horizontal price fixing cases, where the plaintiff claims he paid too much because a group of sellers conspired among themselves to charge a price higher than otherwise would have prevailed in the marketplace. Overcharge is also used in a handful of vertical price fixing cases brought by purchasers claiming that a distributor and manufacturer agreed upon an unlawfully high price that the distributor was to charge (e.g., Reiter v. Sonotone Corp. (1979) 442 U.S. 360). Underpayment is commonly used as a measure of damages when a seller complains of a monopsonistic conspiracy under which a group of buyers will pay no more than a certain agreed upon price. Underpayment is sometimes also used as the measure of damages when a distributor complains that a manufacturer forced him to sell at too low a price.

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* See, e.g., Arizona v. Maricopa County Medical Society (1982) 457 U.S. 332, 343-44 ("The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. * * * [These costs] have been reduced by the recognition of per se rules").

** Presumably, a terminated distributor who was compelled by his supplier to charge a price lower than he might otherwise have preferred could still bring an action for an "underpayment," wherein damages would still be trebled. Very few, if any, termination cases proceed on this theory.

Excluded from the trebling provision of the current law would be all cases in which the damages were calculated on some basis other than overcharge or underpayment. For example, the calculation of injury to a business brought about by a termination or a boycott is not normally based on a claim of "overcharge or underpayment" in the sales price of a good or service, and would therefore not be trebled. This is the usual type of damages sought in a distributor termination or boycott case.*

Also excluded from trebling would be damages arising from price discrimination, because they do not arise in the form of an overcharge. In _J. Truett Payne Co_. v. _Chrysler Motors Corp_. (1981) 451 U.S. 557, the Supreme Court held that price discrimination damages can be proven only by showing an injury to the business, i.e., lost sales or lost profits, not simply by showing the amount of a price differential multiplied by the volume of sales. The distinction between overcharge and discrimination was succinctly stated by Justice Cardozo in _I.C.C._ v. _United States_ (1933) 289 U.S. 385, 389-391:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the [plaintiff].
>
> "Overcharge and discrimination have very different consequences, and must be kept distinct in thought * * *.
>
> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."

As a caveat, let me add that while I think the proposed legislative language is clear, every experienced lawyer knows that whenever legislation draws a distinction between the damages available in one type of case versus another, there will be considerable posturing of parties to take advantage of the category which works to their benefit. That is an inescapable consequence of all legislation addressed to a specific problem. It is not a reason to refrain from enacting much needed relief from abuse.

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* E.g., _Hydrolevel Corp_. v. _Am.Soc. of Mech. Engineers_ (2 Cir. 1980) 635 F.2d 118, affirmed (1982) 456 U.S. 556.

Your Question No. 5

Obviously, it is possible that "risk analysis" could be extended to include legal as well as economic and other factors, but my experience as a Deputy Attorney General, a Federal Judge and a lawyer have given me no reason to believe that this form of analysis reduces compliance with the antitrust laws. Particularly as to the hard-core, plainly illegal types of conduct, I think that if the availability of criminal sanctions and the possibility of single damages does not deter illegal behavior, trebling adds little if any deterrence. As I said in my prepared testimony of March 21:

> "Deterrence arises in litigation from its overall cost, the business disruption it imposes, and the stigma carried by allegations of criminal behavior, not from the prospect of 'trebling' an award many years down the road. I am unaware of any situation where, because of the trebling of a civil award, business people consciously decided to forego unlawful activity which without the trebling they would have otherwise undertaken, and I doubt seriously whether such a case exists."

Your Question No. 6

Even a cursory examination of the recent decisions of the Federal judiciary on antitrust matters reveals that companies do in fact sue their competitors with remarkable regularity. Doctors sue other doctors for exclusion from hospital staffs, competitors sue one another to enjoin mergers, companies sue their competitors claiming predatory pricing, and the list goes on. It is very difficult, however, to quantify the extent to which these cases are "groundless," and even more difficult to identify those which are brought for an anticompetitive purpose.

In my view, the more legitimate of these cases are likely to be brought, irrespective of the trebling feature found in the present law. Many of the suits to enjoin mergers, for example, are presently brought for nothing more than injunctive relief, demonstrating that damages are less of a motivation than the shape of the marketplace. There is little question, however, that the lure of treble damages also motivates a number of competitor-filed lawsuits in other areas.

We should recognize, in this regard, that the incentive for the filing of suits against competitors is perhaps our best and only guide to their legitimacy. The Government recently argued in an amicus brief filed in Cargill, Inc. v. Monfort of Colorado, Inc. (Supreme Court Docket No. 85-473) that a competitor should not have standing to challenge a merger:

> "[T]he economic realities [are such] that competitors generally have a strong incentive to bring such a suit in precisely the wrong cases. If a merger seems likely to result in a new rival that is more efficient and thus able to sell its products at lower prices, the competitors of the new firm will be particularly anxious to thwart its creation, although the threat to competitors will not constitute 'antitrust injury'" (Amicus Brief, p. 8).

I think the same general logic holds true in the non-merger cases and argues for reducing the incentive to sue.

Sen. Metzenbaum's Question Nos. 1 and 2

There is no question but that the private civil remedy, over and above the criminal and civil relief available to the Government, does have a significant deterrent effect upon violations of law. Most people in business are generally aware of the existence of the antitrust laws and the availability of damages to individuals harmed by the violation of those laws. This does not mean, however, that the trebling which accompanies a damage award accomplishes much added deterrence. As noted in my prepared testimony and in my response to "Your Question No. 5" above, I seriously doubt whether anyone about to engage in hard-core price fixing, or any other egregious form of antitrust violation for that matter, was ever deterred because of the trebling feature. It is only in the situation most likely to be analyzed under a rule of reason, where policy should be structured to encourage aggressive behavior, that companies are likely to be deterred under the present scheme of the law.

Sen. Metzenbaum's Question No. 3

The Georgetown Study involved the collection of large amounts of data concerning private antitrust litigation, but to my knowledge no one as yet has drawn any conclusions from that data that would be helpful to this committee. To date, the best effort at analysis of which I am aware is found in the papers presented to the Airlie House Conference last November, and those papers reflect only the most rudimentary and preliminary effort. Certainly one cannot confidently draw from those papers any hard conclusions concerning the role of trebling of damages in antitrust litigation.

Sen. Metzenbaum's Question No. 4

Under Title IV of the Administration proposal, a judgment would be reduced by the amount of damages "fairly allocable" to a settling defendant, with market share used as the basis for such allocation in cases brought to recover "overcharges or underpayments," i.e., in most horizontal price fixing and bid rigging cases. In all other types of cases, the standard for allocation is "relative responsibility for the origination or perpetuation of the violation."

In the market share cases, it is unlikely that disputes will develop over the size and definition of the market to any extent not already present. In a price fixing case, for example, it is the plaintiff who defines the market by the temporal and monetary scope of the sales transactions he manages to get into evidence, and the real fight is between the plaintiff and the defendants over how long and how widespread were the impact of the the alleged conspiracy. Once that is determined, the calculation of market share is almost a ministerial task.

The more difficult problems associated with the claims reduction provisions of Title IV are likely to arise in situations for which "market share" is not a workable measure of allocation, i.e., most boycott and distributor termination cases. In Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179 (8th Cir. 1979), for example, the Eighth Circuit considered the proper allocation of liability in the context of a lawsuit brought by a terminated distributor against his former supplier and his replacement distributor.* Market share would have been completely meaningless as a measure of allocation, because both defendants had 100 percent of the only "market" involved, i.e., the sales of goods from the manufacturer to the new distributor. The Eighth Circuit dealt with the problem by allocating responsibility on a per capita basis.

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* The court in Professional Beauty Supply held that a right of contribution existed among defendants. This ruling was subsequently nullified in Texas Industries, Inc. v. Radcliff Materials, Inc. (1981) 451 U.S. 630, which held that the underlying right of contribution was for Congress, not the courts, to create.

I hope that the foregoing is fully responsive to the questions and is helpful to the Committee.

Very truly yours,

Charles B. Renfrew

The CHAIRMAN. Thank you very much, Judge. We are glad to have you with us.

You were Deputy Attorney General during what years?

Mr. RENFREW. Well, in the last year of the first Carter term.

The CHAIRMAN. The last year of Carter's term.

Mr. RENFREW. Yes, sir.

The CHAIRMAN. Mr. Salop, we would be glad to hear from you. If you could complete your statement in about 5 minutes, we are going to have a vote over there in just a little bit, and then we are going to let all of you answer some questions for the record, in order to save time.

STATEMENT OF STEVEN C. SALOP

Mr. SALOP. I will try to be brief.

I have provided the committee with a longer statement written by myself and Prof. Lawrence White of New York University. Professor White was the executive director of the Georgetown project.

What I want to talk about today are the implications of the Georgetown project for the administration's proposals for remedy reform.

The Georgetown project was initiated in 1983. Its goal was to generate data and analysis that might inform the debate over the proposals to reform antitrust remedies.

The heart of the project was the collection of a data base of over 2,000 private antitrust cases.

Before discussing my results, I want to emphasize that the Georgetown project never intended to produce a consensus report. As a result, our conclusions do not necessarily reflect the opinions of the other participants in the project.

Senator METZENBAUM. They do not reflect the opinions of the project?

Mr. SALOP. The other participants in the project.

Senator METZENBAUM. Let me get clear what you are saying—that your testimony is your testimony alone and not that of a group.

Mr. SALOP. Yes, that is what I am saying. A second caveat is that the data cannot magically reveal what the optimal damages multiplier is. This is because the data are limited to cases that were brought and violations that were detected and because the incentives to bring cases and defend cases are very complex. Research by Professor Baxter and a number of other people suggest that settlement rates and plaintiff win rates are determined much more by the cost of litigation and the implications for other cases, rather than to the underlying merits.

Therefore, when Mr. Ginsburg says that plaintiff win rates are very low, for example, I do not think the figures reflect the actual underlying merits of the cases.

Indeed, dealer termination cases, which are probably the most highly criticized of all cases in antitrust, have the highest plaintiff win rate of all the cases in our sample, not the lowest.

With these caveats in mind, let me turn to our results. The average antitrust case is moderate in size. The huge cases that make headlines are the exception, not the rule.

The average case takes about 2 years to litigate and costs the parties about $250,000 in legal fees. Of course, these figures reflect the fact that most cases settle before trial.

The antitrust explosion of the 1970's appears to have substantially subsidized. The number of private cases has fallen dramatically since 1977, in response to court decisions adverse to plaintiffs. This decline in antitrust has been most dramatic in the areas most often criticized: predatory pricing, dealer terminations, and price discrimination.

Suits by competitors make up about one-third of the cases. These complaints are focused in a few areas including predatory pricing, refusals to deal, tying and exclusive dealing, and mergers.

Since 1977, the proportion of competitor suits as well as the absolute numbers have fallen sharply.

The project sample did not separate out the cases that used lost profits rather than an overcharge, so it is not at all clear what fraction of the cases will be subject to detrebling. However, theoretical analysis suggests that the lost profit measure does not systematically exceed total harm from the practices.

Senator **Metzenbaum**. Excuse me. I am having a little trouble hearing you, you are going so fast. What was the last statement you just made?

Mr. **Salop**. Theoretical analysis suggests that lost profits does not systematically overstate the total harm from illegal practices. It is not true as a theoretical matter.

Nor would lost profits, assuming they are measured realistically, systematically exceed the overcharge measure of damages.

A policy of detrebling might significantly conflict with the trend toward the use of rule of reason analysis in antitrust cases. This is because rule of reason analysis cases are more expensive to litigate, and as a result, may require the financial incentives given by treble damages. This has a social benefit as well as a private benefit. By analyzing additional evidence, use of rule of reason has the benefit of improving the accuracy of judgments by courts. Therefore, reduced accuracy resulting from a return to greater use of per se rules may be an unfortunate side effect of detrebling.

If it were true that competitors tended to bring a disproportionate number of frivolous or meritless cases, I should point out that detrebling would not be the only policy response available. An alternative policy would be to tighten up liability standards instead. This alternative has the advantage of restraining only the bad cases, whereas detrebling would tend to restrain the good cases as well as the frivolous ones.

Now, on the percentage of frivolous cases, relative to other plaintiffs, competitors are not more likely to exploit the treble damages remedy by disguising contract and tort claims as antitrust cases. The major offenders in this regard are suppliers, not competitors. Disguised contract and tort claims comprised about 20 percent of our sample.

Competitors are over-represented in counter-claims. However, counter-claims are only about 2 percent of the cases in the data base.

Although most cases are short, some take long enough that the provision of prejudgment interest could be moderately significant.

For example, about 5 percent of the cases in our sample took longer than 7 years. However, the fact that they take 7 years, would not ever make aggregate damages trebled using any reasonable interest rates. Something like a 5-percent real interest rate would only increase real damages in a 7-year period by about 40 percent, not nearly 200 percent.

As for the scope of prejudgment interest, the arguments favoring the award of interest apply to all suits, not just suits by competitors or those that measure damages with lost profits.

Finally, most researchers find that the interest rate should reflect the parties borrowing rates, not the Government's borrowing rate. So something other than the Treasury bill rate ought to be used for figuring interest on damages.

Thank you very much. I will be happy to answer any of your questions.

[Prepared statement and responses to questions follow:]

TREBLE DAMAGES REFORM:
IMPLICATIONS OF THE GEORGETOWN PROJECT

Steven C. Salop

Lawrence J. White [1]

I. INTRODUCTION

The Reagan Administration's proposed Antitrust Remedies Improvements Act would alter private antitrust litigation in four ways: (1) elimination of treble damages in suits by competitors (and others) that base damages on lost profits; (2) automatic payment of prejudgment interest in non-treble damages suits; (3) claim reduction in price fixing cases; (4) payment of attorney's fees to defendants in "frivolous" cases.[2]

The Georgetown Project on Private Antitrust Litigation was designed to inform debate on antitrust remedies. The heart of the Project has been the collection of a wholly new data base, consisting of information on over 2,000 antitrust cases filed in five districts between 1973 and 1983. The Project also commissioned research by a number of scholars to survey the literature on antitrust remedies, devise appropriate analytic tools for the study of remedies and analyze the data collected by the Project. The data set, research results and commentaries were presented at a conference held in November 1985 at Airlie House.[3] A few of the articles will be published by the

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[1] Professors of Economics, Georgetown University Law Center and Graduate School of Business Administration, New York University, respectively. This article represents the opinions solely of the authors and does not necessarily reflect the opinions of the other participants in the Georgetown Project.

[2] The proposal also provides for treble damages in government procurement cases.

[3] The primary research papers were as follows. S. Salop and L. White, "Private Antitrust Litigation: Introduction and Framework"; P. Teplitz, "Private Antitrust Litigation: An Overview"; K. Elzinga and W. Wood, "The Costs of the Legal System in Private Antitrust Litigation"; J. Perloff and D. Rubinfeld, "Settlements in Private Antitrust Litigation"; T. Kauper and E. Snyder, "Private Antitrust Cases that Follow on Government Cases"; G. Benston, "A Comprehensive Analysis of the Determinants of Private Antitrust Litigation, with Particular Emphasis on Class Action Suits and the Rule of Joint and Several Damages"; and S. Calkins, "Equilibrating Tendencies of the Antitrust System, with Special Attention to Motions to Dismiss and for Summary Judgement."

Georgetown University Law Review, and the entire conference proceedings will be published in book form.

In this paper, we will present a brief overview of the data collected by the Project and then discuss some of the data and analysis that sheds light on the package of legislative proposals. The focus of our discussion will be the restriction on treble damages in suits by competitors and the provision of prejudgment interest, although we will also comment on the rest of the proposal.

II. OVERVIEW OF THE DATA

The Georgetown Project collected data on all private antitrust cases filed in the years 1973-83 in five districts -- the Southern District of New York, Northern District of Illinois, Northern District of California, Western District of Missouri and Northern District of Georgia. All relevant data were culled from the docket files on these cases. A follow-up survey was mailed to all of the parties (or their attorneys) on both sides of these cases. This survey yielded a limited amount of data on legal fees and settlements.

There were 2,357 usable cases in the sample. Of these, 398 of the cases were consolidated into 19 multi-district litigations (MDLs) and 1,959 were non-MDL cases. Because the MDLs are more difficult to describe and were not analyzed in detail by any of the Project's researchers, the following analysis mainly will be limited to the non-MDL cases.*

Table 1 reports the illegal practices alleged in the complaints. If primary and secondary allegations are combined, refusals to deal were alleged most frequently, followed by price fixing and tying/exclusive dealing. Based on Kauper and Snyder's classification of horizontal and vertical allegations, 52.8% of the cases involved vertical allegations and 71.6% involved horizontal allegations.[*]

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* See Benston, _supra_ note 2 and our discussion in Section V _infra_.

Table 1: Illegal Practices Alleged in Complaints

	Primary allegations	Combined primary and secondary allegations
Horizontal price fixing	15.7%	21.3%
Vertical price fixing	3.5	10.3
Dealer termination	4.4	8.9
Refusal to deal	12.0	25.4
Predatory pricing	3.1	10.4
Asset or patent accumulation	2.5	5.6
Price discrimination	5.0	16.4
Vertical price discrimination	1.7	5.8
Tying or exclusive dealing	9.6	21.1
Merger or joint venture	2.6	5.8
Inducing government action	0.5	0.8
"Conspiracy"	3.0	5.9
"Restraint of trade"	4.3	10.0
"Monopoly" or "monopolization"	3.7	8.8
Other	8.6	8.9
All horizontal allegations[a]	27.7%	52.8%
All vertical allegations[a]	31.2	71.6
All other allegations[a]	23.0	31.3
No information	25.2	13.4

Note: Percentages sum to more than 100% because a complaint may have more than one allegation

a/ As classified by Kauper and Snyder, Appendix A.

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[*] This sums to more than 100% because many cases made both horizontal and vertical allegations. For the classification scheme, see Kauper and Snyder, *supra* note 2 at Appendix A.

Table 2 reports the business relationship between the plaintiffs and defendants. To avoid double counting of a vertically integrated competitor that may be a supplier and/or a customer as well as a competitor, we distinguished between stand-alone competitors and vertically integrated ones. Thus, competitors were a factor in about 36% of the complaints (22.9% +13.0%).

Table 2: Business Relationship of Plaintiff to Defendant
All Cases

			Number	Percentage
stand-alone competitor	(CO)	=	449	22.9%
vertically integ competitor	(VI)	=	254	13.0
direct customer	(CU)	=	567	28.9
supplier	(SU)	=	93	4.8
final customer	(FC)	=	174	8.9
other	(O)	=	152	7.8
no information	(NI)	=	270	13.8

Table 3 reports information on the process aspects of the 1,802 terminated cases. The mean length of litigation was just over 2 years.[6] The median is less than the mean because the distribution is skewed by a small number of cases that last a long time.[7] Data from the follow-up survey indicated that attorney's fees for both sides in the typical case averaged in the range of $200-280 thousand. For decided cases, the ratio of plaintiff's legal fees to damage awards (recoveries) was in the 10-20% range. That ratio declined for larger awards.[8]

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[6] These figures are a bit low because cases still in litigation at the end of the sample period are ignored. See Salop and White, supra note 2, at page 7 for additional details.

[7] Additional information on the distribution of case length is reported infra in Section IV in connection with the automatic interest provision.

[8] See Elzinga and Wood, Salop and White, supra note 2.

Table 3: Process Aspects of Cases

All Terminated Cases

	Average	Median
Length (days)	757	505
Number of docket entries	70	35
Depositions noticed	5.6	0
Number of judge orders	2.9	2
Thickness of docket file (in inches)	8.2	3.0
Total litigation Costs (thousands)	$200-280	
Ratio of plaintiff fees to award	10-20%	

Table 4 reports data on outcomes. Two alternative definitions of settlement are used. Ambiguity arises because "contested" motions for dismissal may reflect defendant victories while "uncontested" motions may reflect settlements. The data did not permit us to distinguish between these cases. The "narrow" definition classifies terminations on motions to dismiss as defendant victories while the "broad" definition classifies them as settlements. Under the broad definition of settlement, about 88% of the cases settled. Of those that did not settle (litigated cases), plaintiffs prevailed about 28% of the time. Under the narrow definition, about 71% settled and plaintiffs won only 11% of those litigated.

Table 4: Percentage Distribution of Cases in Which Final Disposition is Known

	Broad Definition of Settlement[a]		Narrow Definition of Settlement[b]	
	Terminated Cases	Litigated Cases	Terminated Cases	Litigated Cases
Settlement	88.2%	--	70.8%	--
Judgment for all or some plaintiffs	3.3	28.1%	3.3	11.3%
Judgment for all or some defendants	8.4	71.4	25.9	88.4
Judgment for some plaintiffs and some defendants	0.1	0.5	0.1	0.2

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[a] Includes dismissals in settlements

[b] Includes dismissals in judgments for defendants

Table 5 disaggregates settlement and judgment rates for the two settlement definitions. One initially might be tempted to draw conclusions from these data about the relative merits of different types of cases. However, if the plaintiff win rate were used as a criteria of merit, dealer termination cases would appear to be the cream of antitrust.

Economic analysis suggests that settlement rates and plaintiff win rates are determined largely by the costs of litigation and the implications of a judgment for other cases not yet litigated. For example, if the defendant fears that a loss at trial will have adverse effects in other cases, he is more likely to settle, even if his chances of winning at trial are fairly high. Instead, defendants in this position would choose to litigate only when their likelihood of winning was very high. As a result, the observed plaintiff win rate would be low.

Table 5: Settlements and Judgments by Alleged Practices[c]

	Broad definition of settlement[a]		Narrow definition of settlement[b]	
	Settlement rate	judgments for plaintiffs	Settlement rate	judgements for plaintiffs
Horizontal price fixing	84.2%	24.6%	68.3%	12.3%
Vertical price fixing	88.5	19.0	72.5	8.0
Dealer termination	86.2	43.5	74.5	23.8
Refusal to deal	85.6	25.4	68.6	11.6
Predatory pricing	92.9	23.1	77.6	7.3
Price discrimination	88.9	34.4	73.0	14.1
Tying/exclusive dealing	87.7	28.9	72.2	12.7

[a] Includes dismissals in settlements

[b] Includes dismissals in judgments for defendants

[c] Combined primary and secondary allegations

Opposite results would be obtained where settlement would have adverse effects on other cases or where the plaintiff has special incentives to avoid trial for fear of the impact on other cases.*

Table 6: Case Load and Frequency of Alleged Illegal Practices

	Case Load[a]		Alleged Practices[b]						
	U.S. Gov't Cases	Private Cases	Horizontal price fixing	Vertical Price fixing	Dealer termination	Refusal to deal	Predatory pricing	Price discrimination	Tying or exclusive dealing
	64	1,230	25.7	13.6	12.1	28.0	9.8	18.7	26.6
	92	1,375	20.5	7.3	11.7	25.4	10.2	20.0	29.8
	70	1,504	28.6	8.5	7.7	21.4	10.7	14.1	19.2
	78	1,611	17.3	7.3	6.4	21.8	11.4	17.7	18.2
	72	1,435	18.9	15.8	10.0	34.7	11.6	14.7	18.9
	78	1,234	18.2	13.3	11.5	33.9	13.3	21.8	19.4
	78	1,457	17.2	4.5	8.2	26.1	9.7	13.4	15.7
	142	1,292	19.6	7.1	10.1	24.4	8.3	10.1	16.7
	111	1,037	23.1	8.3	4.6	15.7	7.4	9.2	12.0
	95	1,192	32.1	8.0	2.7	15.2	5.4	9.8	17.9
s			21.3	10.3	8.9	25.4	10.4	16.4	21.1

ll U.S. Districts

ombined primary and secondary allegations (sample only)

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* A manufacturer may litigate dealer terminations even where its case is relatively weak rather than get a reputation with dealers as a weak adversary. This conduct would be consistent with the high plaintiff win rate for dealer terminations. However, this would be inconsistent with a high settlement rate.

Table 6 reports the trends over time in the total number of government and private cases filed and the practices alleged in the cases comprising the Project sample. It is noteworthy that the number of private cases in all Districts generally was less than 1,000 before 1970.[10] The number of complaints increased to a peak of 1,611 in 1976 and has now fallen back towards 1,000.

An examination of the types of allegations in the Project sample (of non-MDL cases) indicates that horizontal price fixing has risen over time while predatory pricing, price discrimination and dealer terminations have fallen significantly. These results dramatically reflect the changing judicial standards in these areas.

Table 7 reports the trends in settlement and judgment rates. Regardless of which settlement definition is used, the plaintiff win rate has clearly fallen since 1980.

Table 7: Settlements and Judgements: Percentage of Cases Settling and Percentage of Judgements Favorable to Plaintiffs, by Year of Filing

	Broad definition of settlement[a]		Narrow definition of settlement[b]	
Year that case was filed	Settlement rate	judgments for plaintiffs	Settlement rate	judgements for plaintiffs
1973 and earlier	83.6%	32.3%	71.7%	17.0%
1974	83.3	15.6	72.6	9.6
1975	92.8	57.1	73.2	15.4
1976	85.6	26.7	66.8	11.4
1977	89.5	30.0	72.8	11.5
1978	86.1	21.7	65.1	8.6
1979	94.0	41.7	71.6	13.2
1980	91.0	25.0	72.3	8.1
1981	89.9	20.0	72.6	6.2
1982	91.0	14.3	68.4	4.0
1983	92.7	66.7	73.8	8.2
All cases	88.2	28.1	70.8	11.3

a/ Includes dismissals in settlements

b/ Includes dismissals in judgments for defendants

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[10] The major exception was 1962 where over 2,000 private cases were filed; they were mainly electrical conspiracy follow-on cases.

Overall, Tables 6 and 7 suggest that the "antitrust explosion" of the 1970's has now subsided. Court decisions adverse to plaintiffs appear to have reduced plaintiffs' incentives to file suits. This has led to a reduction in the overall number of cases, especially in those areas where standards have changed most drastically.

III. SUITS BY COMPETITORS

The proposed bill is premised on the belief that suits by competitors should be restrained. It is argued that the threat of suits by competitors over-deter potentially procompetitive behavior such as aggressive low prices and innovative distribution practices. Competitors, it is claimed, use the threat of antitrust litigation strategically to reduce competition that would enhance efficiency and result in lower prices to consumers. To deal with this problem, the Administration elsewhere has supported efforts to restrain competitors' standing in suits to enjoin mergers. The remedies proposal attempts to deter competitor suits by eliminating the trebling of lost profits. Only if competitors' damages consist of pricing overcharges (or undercharges) would trebling apply.[11]

The Georgetown Project collected a variety of data that can inform the debate on this proposal. These data cannot reveal magically whether the threat of competitor suits has led to under-deterrence of inefficient exclusion versus over-deterrence of efficient distribution. However, by comparing data on suits by competitors relative to those by non-competitors, the significance of the Administration's claims can be better evaluated. The Project researchers also pursued a variety of theoretical analyses of litigation incentives that bear on this question.

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[11] Similarly, detrebling also would apply to the many dealer termination and other vertical restraints cases in which lost profits form the basis of damages. Much of our analysis will apply to these cases as well.

A. BACKGROUND DATA

We first discuss the relative number of cases brought by competitors. As reported in Table 2, stand-alone competitors accounted for 22.9% of the cases. Vertically integrated competitors that were also customer or suppliers added another 13%, for a total of 35.9%.

The Administration is correct that certain types of allegations were represented disproportionately in competitor suits. Table 8 reports the alleged illegal practices. Stand-alone competitors were most likely to allege refusals to deal, predatory pricing and tying or exclusive dealing. Mergers also are overrepresented. At 13.8%, merger complaints were a larger fraction for stand-alone competitors than for any of the other categories. Aside from refusals to deal, which is a catch-all category, these results are consistent with the conventional wisdom. The results for vertically integrated firms obviously were less striking because these plaintiffs brought cases in their roles as customers or suppliers as well as rivals.

The Administration also has claimed that rivals try to disrupt efficient distribution systems. Most suits by stand-alone rivals alleged only "horizontal practices." Only 22.3% made any "vertical" allegations. This is far lower than the rate for vertically integrated competitors (98.8%) or customers (117%).[12] However, it is not clear that relative percentages are a good benchmark. Customers obviously would bring more vertical cases and competitors could plead many exclusionary vertical contracts as horizontal practices (e.g., refusals to deal). In any event, the Administration's proposal also would detreble customer suits that base damages on lost profits, and the Administration generally has been hostile to vertical restraints cases.

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[12] This rate can exceed 100% because of multiple allegations. We have not yet aggregated allegations into mutually exclusive categories.

Table 8: Alleged Illegal Practice a/

Business Relationship

	stand-alone competitor	vertically integ. competitor	direct consumer	supplier	final customer	other	no information
oriz price fixing	17.2%	22.0%	24.0%	19.4%	60.4%	20.4%	4.8%
ert. price fixing	6.9	13.0	19.2	5.4	6.9	6.6	0.7
ealer termination	1.6	12.2	22.6	4.3	0.0	2.0	0.7
efusal to deal	23.4	40.6	35.3	31.2	12.6	23.7	0.7
redatory pricing	23.2	11.8	8.5	8.6	3.4	2.0	1.5
sset accumulation	9.6	12.2	3.2	4.3	3.4	3.3	1.1
rice discrimination	16.2	25.2	23.6	15.1	14.9	4.0	2.2
ert. price discrim.	5.3	10.2	9.2	4.3	1.1	2.6	0.7
ying/excl. dealing	22.3	22.8	30.7	21.5	17.2	14.5	3.7
Merger/joint venture	13.8	6.3	3.0	4.3	4.0	4.0	0.4
Induce gov't. action	1.8	1.2	0.4	0.0	0.0	1.3	0.0
"Conspiracy"	8.0	6.6	4.6	8.6	6.9	8.6	1.1
"Restraint of trade"	13.1	11.0	9.0	11.8	8.0	13.8	2.7
"Monopolization"	15.2	12.2	7.2	3.2	6.3	7.9	2.6
Other	11.6	10.6	5.5	12.9	8.0	23.0	1.1
No information	2.7	2.4	0.9	2.2	2.3	4.0	84.4
All horizontal b/	79.0	64.5	45.9	39.8	77.5	37.6	11.1
All vertical b/	22.3	98.8	117.0	66.7	37.8	49.4	6.5

a/ Percentages can sum to more than 100% because complaints make multiple allegations

b/ As classified by Kauper and Snyder, Appendix A.

Other data flesh out this picture. Based on Table 8 and other data on the total number of complaints not reported here, we can calculate the fraction of predatory pricing and merger cases brought by competitors.[13] Competitors brought 53.7% of predatory pricing cases and 57.7% of complaints challenging mergers and joint ventures, whereas they brought only 35.9% of all complaints.

These data do not reflect judicial trends, however. The trends reported in Table 9, are striking. We first examine the overall number of cases. Whereas stand-alone competitors accounted for 24.1% of the complaints for the years 1973-77, their percentage of the total declined to 20.8% in the years 1978-83. By 1983, their fraction fell to less than 12% of the total.

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[13] See Table 6 in Salop and White, supra note 2, at page 6.

A similar picture arises from data on the frequency of allegations by all plaintiffs. In 1977, predatory pricing was alleged in 11.4% of the complaints. After 1979, this figure fell continuously. By 1983, the figure had fallen to 5.4%. We have not separately broken out the figures on merger cases. However, the data on Clayton §7 cases is similar. In 1977, §7 violations were alleged in 8.6% of the complaints. By 1983, this had fallen to 2.7%.

Table 9: Business Relationship of Plaintiff and Defendant

	Number	stand-alone competitor	vertically integ. competitor	direct consumer	supplier	final customer	other	no information
973	209	22.0%	8.1%	35.4%	2.9%	11.5%	6.2%	13.9%
74	214	23.4	12.2	35.0	5.6	5.6	8.4	9.8
75	205	24.9	13.2	32.2	4.9	6.8	5.4	12.7
76	234	24.8	10.7	28.6	4.7	13.2	7.7	10.3
77	220	25.0	12.7	26.8	6.8	9.6	3.6	15.4
78	190	19.5	19.0	24.7	5.8	6.3	11.6	13.2
79	165	24.8	16.4	30.9	2.4	6.1	7.9	11.5
80	134	24.6	11.2	22.4	5.2	10.4	11.2	14.9
81	168	21.4	15.5	20.2	5.4	6.6	6.6	24.4
82	108	26.8	13.0	19.4	2.8	10.2	13.0	14.8
83	112	11.6	11.6	38.4	4.5	12.5	8.0	13.4
otal	1959	22.9	13.0	28.9	4.8	8.9	7.8	13.8

Thus, it appears that suits brought by competitors have become a poorer gamble in recent years. Potential plaintiffs have responded to these worsened conditions by bringing fewer suits. This changed environment has included greater judicial use of summary judgments and grants of defendants' motions to dismiss, as well as increased use of the Areeda-Turner Rule, tighter standing requirements flowing from Brunswick and rule of reason jury instructions that hinge liability on proof of injury to competition in addition to proof of injury to competitors.

pre-trial motion to terminate it with the court. Therefore, the data can only be suggestive, not determinative. However, Calkins' regression analysis of the data indicates that defendants were more successful in winning summary relief in the 1980's than in previous years. Dismissals were granted with greater frequency in competitor suits, although summary judgment was granted only with average frequency.[15] With respect to different types of allegations, use of summary judgment was significantly greater in predatory pricing cases. Motions to dismiss (but not summary judgment) were granted with greater frequency in §7 cases. According to Calkins, this reflects the problems of showing standing to challenge mergers since Brunswick. Calkins also suggests that summary procedures have become more likely in refusals to deal, where competitor suits are overrepresented.

Based on these data, then, one could argue that the problem of competitor suits addressed by the detrebling proposal has been greatly diminished as a result of actions already taken by the courts to limit plaintiffs. As standards have been tightened, potential plaintiffs' incentives to initiate suits have fallen. Therefore, it is not clear that further reform of the statutes themselves is needed. Furthermore, reform may be futile. The courts may react to the change by loosening standards somewhere else in order to maintain the equilibrium preferred by the judiciary.

The Georgetown Project collected information on pretrial motions that was analyzed by Steven Calkins.[14] As discussed earlier, motions to dismiss may overstate the defendant's victory rate. The parties may have settled the case and are using the

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[14] Calkins, supra note 2.

[15] Id. at 69.

Table 10 reports data on the process aspects of suits by competitors. The length of competitor suits is very close to the average for all plaintiffs. For stand-alone competitors, the mean length was 25.0 months versus 25.2 months overall; the median length was 16.6 months versus 16.8 months overall.[16] Competitor suits have more docket entries than average, as reflected by both the mean and median.[17] From this last comparison, one might infer that competitor suits are somewhat more expensive to litigate on average. Unfortunately, the response rate to the Project's follow-up survey of attorneys was too low for us to refine this inference with information about the actual dollar cost of litigation involving competitors, as compared with other antitrust suits.

Table 10: Process Aspects

	Length (months)		No. of docket entries	
	Mean	Median	Mean	Median
Stand-alone competitor	25.0	16.6	78.2	37
Direct customer	23.5	17.8	61.6	33
Supplier	19.8	14.4	51.7	35
Final customer	27.3	21.3	69.4	33
Vertically integ. competitor	26.0	15.2	72.8	34
Other	27.1	18.0	86.2	40
No information	25.6	12.7	72.0	35
All cases	24.9	16.6	70.0	35

Table 11 reports data on the outcomes of cases. It is difficult to draw any policy conclusions about the merits of suits from data on settlements and plaintiff win rates, for two reasons. First, there is ambiguity over whether terminations on pre-trial motions represent settlements or defendant victories. Second, and more fundamental, economic analysis suggests that the average settlement rate and average win rate is determined by the cost of litigation and by the parties' desires to avoid unfavorable decisions (or gain favorable ones) because of the implications of these outcomes for future litigation rather than by the merits of the average case. Given these caveats, we now turn to the data.

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[16] Suits by vertically integrated competitors had the largest means (26.0 months) and a lower median (15.2 months), indicating that most cases were short but a few were very long.

[17] The mean rises by more than the median, indicating the influence of a few large cases.

Table 11: Outcomes by Business Relationship

	Broad Definition		Narrow Definition	
	Settlement rate	Plaintiff win rate	Settlement rate	Plaintiff win rate
tand-alone competitor	91.8%	24.2%	73.2%	7.4%
irect customer	87.1	29.7	73.0	14.2
upplier	92.8	16.7	73.5	4.5
inal Customer	82.9	28.0	63.7	13.2
ertically integ. competitor	90.1	13.6	73.4	5.1
ther	86.0	36.8	61.8	13.5
o information	84.3	40.1	66.4	19.1
ll Cases	88.2	28.1	70.8	11.3

Using either definition of settlement, competitor suits settled more frequently than average, although the differences are not great. Using either definition, competitor-plaintiffs prevailed less often. These differences were large, especially with regard to the vertically integrated competitors. Using the narrow definition of settlement, the average plaintiff win rate was 11.3%, whereas for stand-alone competitors, it was 7.4%; for vertically integrated competitors, the figure fell to 5.1%.

The Project collected some other data that might give some limited information about whether competitors were more likely than other plaintiffs to bring baseless cases. The paralegals examining the dockets were asked to indicate if the central issue of the case was not an antitrust issue. They drew this conclusion in 21.6% of the non-MDL cases, a significant figure.[18]

The Administration's proposal suggests that this problem might be more serious in suits by competitors and dealers, to the extent that they try to disrupt efficient distribution schemes by converting ordinary contract disputes into antitrust claims. Table 12 disaggregates by type of plaintiff those cases in which antitrust claims were not central. The figures for stand-alone competitors are about the same as the fraction of all cases they brought. Customers (both direct customers and vertically integrated competitors) were somewhat more likely to use antitrust in this way, although the differences between their shares of all cases and shares of these cases is not large. Instead, a disproportionate share of these cases come from plaintiffs who are suppliers or who fall into the "other" category.[19]

Table 12: Antitrust Not a Central Issue (by plaintiff type)

	Antitrust not a Central Issue	All Cases
Stand-alone competitors	22.2%	22.9%
Vert. integ. competitors	15.8	13.0
Direct customers	30.7	28.9
Suppliers	8.5	4.8
Final customers	5.9	8.9
Other	14.4	7.8
No information	2.6	13.6

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[18] The Administration's proposal to award successful defendant's attorney's fees in baseless cases also is directed to this issue. See our discussion *infra* in Section V.B.

[19] We do not have further information on this "other" group.

The Administration's proposal to detreble damages based on lost profits would target this issue directly to the extent that lost profits (rather than an overcharge or undercharge) were primarily used as the basis of damages in these cases and not in others. The Project collected no data on the basis used to calculate damages so we do not know whether detrebling would be the most appropriate method of dealing with this problem.

B. THE EFFECTS OF DETREBLING

The Administration's proposal provides three rationales for restricting competitors' actual damages in those cases where lost profits (rather than an overcharge) represent the basis for calculating damages.[20] First, lost profits are less clearly related to the actual social harm from the violation and may overstate the total harm from the practice. Second, competitors require less financial incentive to bring such cases, relative to other potential plaintiffs, because they are well situated to detect violations. Third, competitors are more likely than other potential plaintiffs to challenge potentially procompetitive behavior. The analytic framework set out in the papers presented at the Project's Conference can be used to address three these issues.

To the extent that measured damages tend to understate the actual harm of a practice, a higher damages multiple is appropriate; where they overstate social harm, a lower multiple is called for, holding other things constant. Thus, if lost profits tend to overstate harm, it would be appropriate to limit the multiple. Similarly, if competitors often try to enjoin efficient behavior, then the injuries they claim as damages would contribute to an overstatement of total harm, whatever the damages multiple. It may be true that, in some cases of exclusion of competitors, lost profits understate total harm to others by less than would the overcharge, as conventionally measured. However, the opposite could occur instead.

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[20] The Administration's proposal and rationales are similar to the earlier proposal of Easterbrook. F. Easterbrook, "Detrebling Antitrust Damages," 28 Journal of Law and Economics 445,459 (May 1985).

For example, consider a standard case of denial of access. Suppose a firm agrees with some input suppliers to deny its rivals access to an input. Suppose that, as a result, rivals must purchase the input elsewhere at a higher cost and that this leads to an increase in the price paid by consumers.[21] In this type of case, gross harm to others consists of the sum of lost profits of competitors (injury to competitors) and plus higher consumer prices (injury to consumers).[22] Because rivals' costs are higher, they produce less and use the wrong mix of inputs. Under the assumption that there is insufficient competition in the output market to maintain prices at the competitive level, consumers would pay higher prices and purchase less.[23]

The total harm to others resulting from exclusion is understated by either damage formulation. The lost profit measure would be reduced by the effects of price increases.[24] Similarly, if the overcharge measure is used, it would ignore the loss in consumer surplus from output reductions. These understatements of social harm provide a rationale for a damages multiplier, even in the case of lost profits as a measure.[25]

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[21] These facts also would describe the case of an integrated firm (or group of firms) denying its rivals access to an input it produces.

[22] Under the simplest economic theory of optimal deterrence, this optimal penalty equals the gross harm to others from the conduct. This formula ignores the effect of errors and the role of damages in creating an incentive for enforcers, as discussed elsewhere in this paper. See W. Landes, "Optimal Sanctions for Antitrust Violations," 50 University of Chicago Law Review 652 (Spring 1983).

[23] See Krattenmaker and Salop, "Antitrust Analysis of Anticompetitive Exclusion: Raising Rivals Costs to Gain Power Over Price," Georgetown University Law Center (November 1985) for a detailed analysis.

[24] If the demand for the product is inelastic, then the additional injury to consumers from the price rise will be large, relative to the competitors' lost profits. A proper measure of damages would make the defendant liable for both losses.

It is true that measuring damages as lost profits sometimes could involve less of an understatement than would the conventional overcharge measure. The overcharge measure only compensates the rival for units actually purchased at the higher price, not for the profits that would have been earned on the units not purchased as a result of the higher price.[26] In the extreme case, the overcharge measure of damages might be zero. For example, suppose the next-best-alternative suppliers' prices are so high that the excluded rivals cannot maintain viability but instead choose to exit the industry.[27] In that case, the injured rivals can claim no overcharge since no inputs are purchased at the higher prices. Yet, they would lose their potential profits and lose the value of any unique capital (i.e. capital that has lower value in other uses) they had sunk into the industry. This is a shortcoming of the overcharge measure.

This problem provides a rationale for using lost profits as a measure of damages. However, the fact that the lost profits sometimes provides less of an understatement than does the overcharge measure does not imply that lost profits overstate social harm, only that they may exceed the overcharge measure. In any event, the opposite result well may occur. The lost profits measure may fall short of the overcharge. To the extent that the defendant allows consumer prices to rise, the plaintiff will be able to pass on some of his higher costs. While this type of "passing on" of cost increases is no defense when the overcharge measure is used, it is inherent in a lost profits calculation. For both these reasons, it does not appear to be true that lost profits systematically overstate the harm to others.[28]

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[25] Consumers could initiate their own suit, but that is often impractical. Moreover, competitors are well situated to detect such violations.

[26] In practice, the overcharge may fail to compensate for the higher prices paid on units purchased from non-defendants.

[27] To take a currently fashionable example, suppose the defendant excluded rivals by lobbying (or bribing) a government agency to deny them a license that is essential for operation.

The second rationale for detrebling damages in competitor suits is that they are well situated to detect violations and so require less financial incentive to ferret out violations and sue. This is true as far as it goes. However, there is a second aspect to this incentive issue. The plaintiff must not only sue; it also must win. In that competitor suits have greater uncertainty over outcome than, say, price fixing cases, they would require a higher multiple. While the Georgetown Project has no data on this uncertainty, it seems that competitors prospects will remain very uncertain during this period of flux over the proper legal standard for exclusion cases and competitors' standing. Uncertainty also is systematically higher in rule of reason, as opposed to per se, violations.[29]

The third rationale, that competitors have an incentive to bring antitrust cases to prevent hard competition, appears to be the central rationale for the Administration proposal.[30] We believe that exclusion of competitors can have serious anticompetitive consequences. However, regardless of the exact fraction of cases with merit, detrebling is not the only available remedy.

An alternative approach would clarify liability standards to ensure that competitor-plaintiffs prevail only in meritorious cases.[31] This alternative has the benefit that it focuses directly on the problem and has fewer unintended side effects. Tightening liability standards deters only the undesirable cases, whereas detrebling could deter the desirable cases as well.

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[28] We assume, of course, that the lost profits are calculated under reasonable assumptions of the plaintiff's business prospects. Commentators have been rightly critical of the use of wildly optimistic "but for" assumptions about future prospects for the plaintiff. However, we do not think the best way to deal with this problem is by detrebling all claims of lost profits. That would penalize legitimate as well as illegitimate claims.

[29] For a related point, see Easterbrook, supra note 20 at 456.

[30] This seems to be true for Easterbrook's proposal too. Easterbrook, supra note 20 at 460.

Most economists agree on the direction of needed change in liability standards. The standard should state clearly that injury to competitors without more is insufficient for antitrust liability. Instead, it should be necessary for the plaintiff to prove, or the court to reasonably infer, injury to the competitive process (i.e., to consumers). Although Aspen Ski, Northwest Stationers and Brunswick represent steps towards this goal, greater clarification by the courts or Congress could speed the process.

This suggests an additional rationale for a damages multiple in rule of reason suits by competitors.[32] A damages multiple may be necessary to support the trend towards more sophisticated rule of reason analysis in competitor suits. There are important social benefits to the move towards greater use of quantitative economic evidence in antitrust cases, in terms of an improvement in the accuracy of judgments. Per se rules are inexpensive, but they lead to the wrong outcome in some cases. Hard evidence is expensive to generate and litigate, but it generally leads to fewer errors. In the absence of the financial incentives from treble damages, plaintiffs may find it uneconomical to plead theories requiring hard evidence. Instead, they are more likely to argue for simplified standards that are less expensive to litigate. And courts are likely to permit abbreviated standards and proof in order to maintain fairness.[33] This leads to a potential conflict between detrebling and sophisticated rule of reason analysis.[34] This is related to the issue of the proper liability standard as well. If it is too expensive, in the absence of the financial incentives provided by a damages multiple, for a plaintiff to prove injury to competition, the courts may be overly willing to infer injury to competition from proof of injury to the competitor. We think this would be a step in the wrong direction. It is not clear that the perceived benefits from detrebling exceed this potential cost.

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[31] See Easterbrook, supra note 20 at 456 and 459. We should also note that the Administration's proposal to provide defendants with attorney's fees for frivolous complaints is a useful supplementary tool. See also our discussion in Section V.B. infra.

[32] This rationale can be contrasted to the proposal that treble damages be reserved exclusively for per se offenses. That proposal also has been criticized by Easterbrook for reasons complementary to ours. Easterbrook, supra note 20 at 457 et seq.

The Administration's analysis of the proposed bill does not discuss the effect of the damages multiplier on the cost of litigation that does take place. There are two aspects to this issue. First, increasing the damages multiple gives the parties an incentive to increase litigation costs because more is at stake. The Project's data indicate that litigation costs do rise with the stakes of litigation (as represented by the initial damage claims in the case), although the increase was less than proportional. As discussed above, to the extent that greater litigation effort reduces the rate of incorrect assignment of liability, then this represents a social benefit, though not necessarily equal to the higher costs.

Second, the damages multiple affects the parties' incentives to settle before reaching a final verdict. Settlements are efficient in that they economize on the costs of the legal process.[35] As a purely theoretical matter, detrebling damages could either increase or decrease the settlement rate.

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[33] For example, in a $500 dispute, courts would not dismiss plaintiff's proof of damages as speculative, if the plaintiff used back-of-the-envelope calculations instead of the sort of sophisticated empirical evidence now presented in large antitrust cases.

[34] For a related analysis, see Easterbrook, supra note 20 at 458.

[35] Of course, there can be too many settlements, for example, in the case where a plaintiff coerces an innocent defendant into settlement with the threat of high litigation costs and a chance of an erroneous finding of liability.

Litigation settles when the divergence in the parties' expected stakes in the litigation is dominated by the costs of continuing to judgment and when strategic bargaining by the parties does not destroy the chance for mutual gain. On the one hand, by reducing the stakes, detrebling reduces the divergence in stakes, increasing the chance of settlement. On the other hand, in cases that have the potential for settling, detrebling reduces the bargaining range and, therefore, strategic bargaining conduct is more likely to prevent settlement.

Using the Project data set, Perloff and Rubinfeld tried to estimate the effect of detrebling on the settlement rate.[36] Although their results are quite preliminary and by no means certain, they do predict a reduction in the overall settlement rate from detrebling. That is, it appears that the effect of strategic bargaining would outweigh the effect of the reduction in the stakes. Perloff and Rubinfeld's analysis unfortunately does not distinguish between competitor suits and other complaints. It is possible that the results would differ if the data were disaggregated.

IV. PREJUDGMENT INTEREST ON DAMAGES

The Administration's proposal would provide for automatic payment of prejudgment interest to plaintiffs in those cases where damages are not trebled. The rationales for this change are to compensate plaintiffs' for the time cost of money and to reduce defendants' incentives for delay inherent in a system where no interest (or interest below the market rate) is accumulated. It would not alter the provision of prejudgment interest in treble damages cases.[37]

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[36] Perloff and Rubinfeld, supra note 2.

[37] The Administration's analysis of the proposed bill does not make clear why automatic prejudgment interest also should not be awarded in treble damages cases. Indeed, if damages are trebled, the guilty defendant's incentives for delay are increased. Nor does the analysis explain why awards of reasonable attorney's fees should not be subject to automatic interest.

The Georgetown Project collected data on the duration of antitrust cases. Table 13 reports the duration of litigation from the date of the complaint to termination. These figures understate the total duration from time of violation, of course. The Project unfortunately collected no information on the length of time between the onset of the alleged violation until the filing of a complaint.

Table 13: Duration (in months) of Cases, by Business Relationship

Percentile	All Cases	stand-alone competitors	Integ. Competitor
25%	7.4	7.8	8.2
50(median)	16.6	16.6	15.2
75	35.2	36.0	36.5
90	60.7	57.9	64.0
95	76.4	80.5	92.9
MEAN	24.9	25.0	26.0

Although the average duration of the litigation was about 2 years (24.9 months for all cases), there was a wide distribution of durations. About 75% of all cases were completed within 3 years (35.2 months), but the top 10% lasted longer than 5 years (60.7 months). The results for competitor suits were similar. At the high end, durations were somewhat longer. Whereas 5% of all cases lasted longer than 76.4 months, the top 5% of stand-alone competitor cases lasted 80.5 months, and the top 5% of cases brought by vertically integrated plaintiffs lasted 92.9 months.

For the cases with the longest durations, payment of interest could raise compensation levels considerably. At a real (inflation free) interest rate of 5%, 7 years of interest would increase the damages payment by 40%. That is, a judgment of $1 million would become $1.4 million, including interest.[38]

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[38] At 10%, the increase would be 95% for a total of $1.95 million. The nominal interest rate would be higher if the economy expected further inflation, but the premium for inflation would reflect an additional cost of waiting for the compensation.

The proposal specifies a benchmark rate of interest equal to the yield on one year Treasury Bills, although it gives the court final discretion over the rate. Aside from questions of timing, the Treasury Bill rate appears inappropriately low.[39] Prejudgment interest is intended to take into account the time value of money to the parties. Use of the Corporate Prime lending rate or a corporate bond rate would better approximate the parties' true time cost of money.

V. OTHER PROVISIONS

In this section, we discuss the provisions relating to claim reduction and award of attorney's fees in baseless cases.

A. CLAIM REDUCTION

The Administration proposal would mandate claim reduction in price fixing cases in order to prevent the "whipsaw" effect by which non-settling defendants can be made responsible for huge damage awards. It is claimed that strategic use of this whipsaw effect by plaintiffs' attorneys in class actions can coerce small, even innocent defendants into large settlements.

As mentioned earlier, the Project collected data on about 400 cases that had been consolidated into 19 multi-district litigations (MDLs). This data is somewhat more difficult to analyze than the non-MDL cases, and the data on settlements are limited. Unfortunately, the Project was not able to analyze the cases at any depth.[40] As a result, we cannot provide the type of background data presented earlier for non-MDL cases.

More thorough analysis of the MDL data might or might not be able to illuminate the severity of the whipsaw effect. Analysis might be able to reveal whether the instance of the small, possibly innocent defendant "left holding the bag" has the empirical significance necessary to justify a change in the rule or whether it is an "outlier" that rarely occurs in practice.[41] We hope that this analysis can be introduced into the debate.

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[39] There also is the question of the date of the T-Bill rate. As the proposal notes, the interest rate at the time of judgment may differ from the rates at the time of violation and during the litigation.

[40] See Benston, supra note 2. We do know, however, that these cases had more parties and docket entries, lasted longer and gave larger settlements than the non-MDL cases. See Salop and White, supra note 2.

B. AWARDS OF ATTORNEY'S FEES IN FRIVOLOUS CASES

Finally, the proposed Bill would award attorney's fees to prevailing defendants in cases where the plaintiff's complaint was "frivolous, unreasonable, without foundation, or in bad faith." The rationale for this provision is to prevent "strike suits" filed primarily to extract a favorable monetary or injunctive settlement.

The Project collected some data directed to this issue. First, it has been suggested that counterclaims are an important potential source of allegations made primarily for strategic purposes. Of the non-MDL cases, counterclaims were filed in only 2.4% of the cases. Plaintiffs were more likely to be competitors or suppliers than dealers or final customers. These cases also were significantly shorter and had fewer docket entries and depositions than did the other cases.

Second, as discussed earlier, the paralegals examining the dockets were asked to indicate if the central issue of the case was not an antitrust issue. They drew this conclusion in 21.6% of the non-MDL cases. This figure is significant. The types of allegations for which these cases differed most from the overall sample are reported below in Table 14. These "non-central" cases were more likely to allege refusals to deal and dealer terminations and less likely to allege horizontal price fixing, predatory pricing or price discrimination. Thus, these cases appear closer in character to ordinary contract disputes than are most antitrust cases.

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[41] In an analysis of publicly available data from a single litigation (that was not in the Georgetown sample), Benston found that the order of settlement by a defendant (holding other things constant) had a positive effect on the size of the settlement.

See Benston, supra note 2.

Table 14: Antitrust Not a Central Issue (by allegations)

	Antitrust not a Central Issue	All Cases
Horizontal price fixing	11.1%	21.3%
Predatory pricing	7.8	10.4
Price discrimination	13.4	16.4
Refusal to deal	31.6	25.4
Dealer termination	11.1	8.9

Table 12 disaggregated these cases by type of plaintiff. As discussed earlier, suppliers and "other" plaintiffs made these claims disproportionately. Final customers were least likely to turn non-antitrust claims into an antitrust suit.

VI. CONCLUSIONS

The Georgetown Project collected a variety of data that can inform the debate over the Administration's proposal to reform antitrust remedies. More analysis of the data clearly is needed in order fully to devise the best reform proposal. Even if the current proposal is flawed, the fact that a concrete proposal now exists will encourage more analysis. We look forward to other scholars' utilizing the data set and extending our preliminary analysis. We hope that the data set will prove to be a useful resource.

QUESTIONS FROM SENATOR THURMOND

1. I cannot speak to the origins of the Sherman Act. However, there are three general rationales for a damages multiple in antitrust suits (analogous to punitive damages in torts). First, only a fraction of all violations are detected. A damages multiple is needed to raise the expected financial exposure of potential violators in the face of this imperfect detection. Second, as discussed in the article I distributed to the Committee, a damages multiple is needed because antitrust damages (measured by either lost profits or the overcharge) systematically understate the total harm to others from the conduct. Third, an antitrust violation causes injury to a large and diverse set of consumers. Unless the class action mechanism works perfectly, this also would imply that damages would systematically understate total harm.

Whether these factors exceed the same factors applied to torts is not transparent. The answer may depend on the type of tort. On the one hand, one might guess that a higher fraction of accidents than potential antitrust violations are detected by victims. Antitrust violation obviously injure a larger set of victims than negligence in the typical single victim accident case. These factors would justify a higher damages multiple in antitrust. On the other hand, some might argue that uncompensated pain and suffering harms could well exceed the understatement of damages in antitrust. Moreover, products liability cases affect a large and diverse set of victims on the same scale as the typical antitrust case.

In any event, the application of punitive damages in torts, especially with respect to products liability, also is controversial; these arguments might imply that damages in tort also should be multiplied routinely, rather than implying that antitrust damages should be detrebled.

2. No Comment

3. No Comment

4. Yes. It is not clear how the violation would apply in exclusionary conduct cases. For example, consider a case in which the defendant allegedly conspired with one or more suppliers to refuse to deal with the plaintiff. In this case, the plaintiff is injured because it must pay a higher price for the inputs now purchased from other suppliers. This is an overcharge. However, in this case, the overcharge is not paid to the defendant or co-conspiretors. It is paid to other suppliers.

I do not know whether the Administration proposal would treat this as an overcharge? It should, I think.

In the context of horizontal price fixing, the plaintiff may collect this overcharge. The law appears unsettled on the point, however. Economic analysis of deterrence would support a rule allowing the plaintiff to collect these damages in both price fixing and exclusion. If they are not treated as an overcharge, then deterrence could be seriously reduced. Moreover, to not treat it as an overcharge in exclusion cases would essentially instruct courts to do the same in horizontal cases.

Treating it as exclusion raises Professor's Turner's point in a different context, however. Would the higher prices paid other suppliers only be an overcharge if suppliers raised prices? That seems inconsistant. Suppose their products were more expensive to begin with or were inferior. It would follow that the plaintiff should collect the difference in cost as the overcharge, because that is the higher price paid as a result of the exclusion.

5. The data from the Georgetown Project suggests that potential plaintiffs engage in at least informal risk analysis. Court decisions in recent years have been adverse to plaintiffs in some areas, and subsequently, fewer new suits have been initiated.

There is no reason to think that potential defendants would be less rational. However, I think it would be unfair to suggest that firms knowingly violate the antitrust laws. Instead, their calculations probably involve undertaking conduct involving unsettled areas of the law or conduct "closer" to the line.

In any event, it seems reasonable to think that if the financial exposure flowing from conduct that potentially violates the antitrust laws were reduced, firms would be less concerned about avoiding that conduct. Thus, deterrence would be reduced.

6. The Georgetown Project collected data on this point. It is set out in the article I presented to the Committee.

Counterclaims sometimes are viewed as a source of baseless claims. Only 2.4% of the cases in the Georgetown sample involved counterclaims. Competitors and suppliers were more likely to file counterclaims and dealers and final customers were less likly to file them.

Cases in which it appeared antitrust claims were not central comprised 21.6% of the sample. These claims were not made disproportionately by competitors. Suppliers were more likely to file this type of claim.

We have no data regarding whether frivolous claims were more likely to base damages on lost profits rather than a price overcharge.

QUESTIONS FROM SENATOR METZENBAUM

1. [See the answer to Senator Thurmond's Question 5.]

2. The Georgetown Project did not analyze this question. A study by Alan Beckenstein and others analyzed the antitrust compliance programs of a number of major corporations. Their results are reported in an article "An Executive's Guide to the Antitrust Compliance," Harvard Business Review, 1983 and "Antitrust Compliance: Results of a Survey of Legal Opinion," Antitrust Law Journal, Spring 1983.

3. The Georgetown Project did not intend to produce a consensus report. Therefore, I cannot report the opinions of the other participants.

Based on our analysis, Professor White and I do not believe that the data or analysis imply that detrebling is appropriate in any area. We believe that, as an alternative, antitrust liability standards should be clarified to require proof of consumer injury and baseless suits should be penalized directly (by financial penalties or the award of attorney fees). In this way, only non-meritorious cases are deterred. We also believe that prejudgment interest should be awarded in all cases, at a rate approximating the borrowing rate of the parties involved.

4. The Georgetown Project's data on multi-district litigation has not been analyzed, as we discuss in our article. As a result, I am not prepared to evaluate the Administation's claim reduction proposal in detail. I would recommend, however, that the Georgetown data set be analyzed.

The current rule has two effects that may be distinguished. First, a rule of joint and several liability leads to the possibility that a defendant will be exposed to a damages multiple in excess of three. Second, the current rule leads to a "whipsaw" effect and makes the "effective" multiplier larger for smaller firms. The first effect is generally less criticized, because naked price fixing is the hardest conduct to condone on efficiency grounds, so that over-deterrence is less of an issue. It is this second effect that the critics focus on -- the whipsaw effect and the fact that the smallest firms, who may have the least effect on the success of the conspiracy, are liable for the largest multiplier.

An alternative proposal would be to limit claim reduction only to the smallest firms in the industry while reserving full joint and several liability to larger firms. That would eliminate the whipsaw effect and extra-ordinary financial exposure for the small firms, while maintaining maximal deterrence for the large firms. A market share of 5% or perhaps 10% might be the appropriate threshold.

It is reasonable to expect that both the Administration's proposal and this alternative sometimes could lead to disputes about market shares that could be quite expensive. I understand that the DES litigation in California currently is involved in just this type of dispute over the market shares on which to allocate damages. Substantial resources apparently are being expended to litigate these figures. Information on the cost of that litigation would throw light on this issue.

The CHAIRMAN. Thank you very much.

I want to thank all of you distinguished gentlemen for coming today. We are going to have a few questions we will submit to you for the record, if that is agreeable. And in view of the vote that is coming on now, we will adjourn and submit the questions—Senator Metzenbaum, did you have further questions today?

Senator METZENBAUM. No; I will be submitting some questions to several of the panelists, but we are engaged in a vote at this very moment, and I think we had better get to the floor.

The CHAIRMAN. Thank you.

The committee stands adjourned.

[Whereupon, at 11:05 a.m., the committee was adjourned.]

ANTITRUST REMEDIES REFORM—S. 2022 AND S. 2162

TUESDAY, APRIL 15, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon, Metzenbaum, and Specter.

Staff present: Ken Starling, chief antitrust counsel; Chris Dunn, minority counsel; Eddie Correia, minority counsel; and Linda Spector, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

This morning the committee is continuing a series of hearings on proposals to reform antitrust law and procedures. These hearings are focusing primarily on a comprehensive legislative proposal recommended by the administration.

One part of that legislative package is S. 2162, a bill to revise antitrust remedies in various ways, and one part of that bill is a proposal to establish a claim reduction mechanism in private treble damage suits.

The administration's claim-reduction proposal is identical to the claim-reduction plan reported favorably by this committee in 1982. This claim-reduction proposal deals with a problem that is addressed in a somewhat different way by another bill pending before this committee, S. 1300.

On July 13 of last year, with the support of 10 other members of this committee, I introduced S. 1300 to remedy two serious problems that arise in private antitrust litigation. Those problems are the "whipsaw settlement" effect and the abusive selection of defendants by plaintiffs.

We have heard discussion on those problems in earlier hearings on S. 1300. The administration's proposal addresses one of those problems, the whipsaw settlement pressure on defendants, but differs in its operation from S. 1300.

I have scheduled this hearing so that the Committee may consider the merits of the administration's claim-reduction proposal and compare it to S. 1300.

To assist us, we have a distinguished group of witnesses on both sides of the issues. We will hear first from Douglas Ginsburg, the

Assistant Attorney General for Antitrust. We will hear then from a panel including Dirk Soutendijk of the Union Camp Corp.; Alan Wiseman, representing the U.S. Chamber of Commerce; James Halverson, chairman of the American Bar Association's Antitrust Section; Mr. Laddy Montague, a plaintiffs' antitrust attorney; and Lloyd Constantine on behalf of the National Association of Attorneys General.

We will also have written statements from the National Association of Manufacturers and the Business Round Table, expressing their continuous support for S. 1300.

We will begin with Mr. Ginsburg from the Justice Department. We are very pleased to have him with us. He is a very able antitrust lawyer.

Mr. Ginsburg, you may now proceed.

STATEMENT OF HON. DOUGLAS H. GINSBURG, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC, ACCOMPANIED BY STEVE CANNON, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. GINSBURG. Thank you very much, Mr. Chairman.

With your permission, I will be accompanied today by my Deputy, Mr. Steve Cannon, who is well-known to the committee from his prior public service here.

Mr. Chairman, the committee has visited and revisited the issues raised today for a period of 7 years, and I am hopeful that the committee will now be in a position to resolve how best to solve these problems.

The question, of course, is whether antitrust defendants are in certain instances being treated unfairly by the convergence of joint and several liability for antitrust damages with treble damage liability, plaintiffs' attorneys' fees, and class action litigation.

Under current law, antitrust plaintiffs have the ability to sue and recover all of their damages from some rather than all of the persons that have participated in an antitrust conspiracy or to enter into settlement agreements with some defendants for relatively small sums and shift the balance of those defendants' damage liability to nonsettling defendants, who then face increased pressure to settle rather than to litigate, regardless of the merits of their defense. This, of course, is the "whipsaw" problem to which you referred.

The administration believes that whipsaw settlements can and do result in unwarranted and unintended unfairness to antitrust defendants and should, to the greatest extent practicable consistent with other antitrust law enforcement goals, be eliminated.

The two bills that the committee has for consideration today differ in the following significant respect. S. 1300 would eliminate joint and several liability in horizontal price-fixing cases. It would thus, of course, eliminate the possibility of whipsaw settlements in those cases to which it applies.

The administration's proposal, S. 2162, would make a number of improvements in antitrust remedies generally. In this regard, however, title IV of S. 2162 would provide a right of claim reduction for all antitrust damage cases.

Claim reduction requires a court to deduct from a plaintiff's remaining claim the damages fairly allocable to any person whom the plaintiff has released from liability if that amount is greater than the actual amount of the settlement. This would substantially eliminate the possibility of whipsaw settlements.

The administration is opposed to the approach taken in S. 1300 because, while increasing fairness in antitrust litigation is an important consideration, our first concern must be to maintain appropriate levels of deterrence. In our view, S. 1300's elimination of joint and several liability would decrease deterrence of hard-core antitrust offenses to an unacceptable degree, a problem that we think can be avoided by the claim-reduction approach.

Eliminating joint and several liability would reduce the probability that a violation would be detected and pursued through damage actions by reducing the expected recovery of potential plaintiffs. It would also, of course, reduce the expected liability of defendants.

Claim reduction would not reduce deterrence to the same extent as eliminating joint and several liability. It would not prevent a plaintiff from recovering all of its damages from any one defendant found to have violated the law after a trial on the merits.

Each of these alternatives would admittedly increase somewhat the litigation that might be required to resolve antitrust disputes. But the only litigation that could arise from claim-reduction would be over a settled defendant's fair share of the plaintiff's damages.

Since most such cases are fully settled, in the typical case there will be no additional litigation by reason of the claim-reduction mechanism.

In sum, in our view, claim-reduction is a preferable solution to the whipsaw settlement problem from both deterrence and judicial burden standpoints.

That is not to say, Mr. Chairman, that claim-reduction or S. 2162 is perfect. We have heard concerns raised that S. 2162 might not adequately remedy the whipsaw problem if plaintiffs changed their whipsaw tactics and simply chose not to sue or to release some culpable parties.

Some leaders of the antitrust bar tell me that the dynamics of the damage litigation process would operate to alleviate this concern if plaintiffs were required to join all culpable parties as defendants in price-fixing treble-damage actions. Such a joinder could facilitate fair settlements with accompanying claim reduction, or fair sharing agreements that would frustrate unfair whipsaw settlement tactics.

Thus, Mr. Chairman, the Department would have no objection to modification of the administration's proposal on claim reduction to require plaintiffs to join as defendants culpable parties whose sales figure into their damage calculations or else face reduction of their claims by the fair share of damages attributable to such parties. Such a modification really would not change what we believe to be the best solution to the fairness concerns that have arisen as a result of joint and several liability, but would alleviate any unfairness problem plaintiffs could create by suing only some of the appropriate defendants.

In other words, Mr. Chairman, with this modification, S. 2162 would address both of the problems that you identified—that of the whipsaw settlement and that of selectively suing only certain defendants.

We would be happy to work with the committee in perfecting the appropriate language to accomplish this goal.

Mr. Chairman, that concludes my prepared statement. I would be happy to address any questions the committee may have.

[Prepared statement and responses to questions follow:]

STATEMENT OF

DOUGLAS H. GINSBURG
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

CONCERNING

JOINT & SEVERAL LIABILITY AND CLAIM REDUCTION IN ANTITRUST DAMAGE CASES

April 15, 1986

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you to present the Administration's views on damage allocation in antitrust litigation. The question of how best to allocate liability for damages among antitrust defendants has been before this Committee numerous times in the last 7 years, and I hope that my remarks today will assist you in determining how best finally to resolve this continuing dilemma.

In light of the Committee's obvious familiarity with this area of antitrust policy, I will greatly abbreviate my remarks on the need for some legislation. 1/ The question we face is whether antitrust defendants are, in certain instances, being treated unfairly by the convergence of joint and several liability for antitrust damages with treble-damage liability, plaintiffs' attorneys' fees, and class-action litigation. Because of joint and several liability, antitrust plaintiffs have the ability to sue and recover all of their damages from

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1/ A full discussion of the history of joint and several liability in antitrust and the potential problems that can arise as a result can be found in the testimony of William F. Baxter, Assistant Attorney General for Antitrust, before the Senate Comm. on the Judiciary Concerning S. 995 (April 22, 1981) and of Charles F. Rule, Acting Assistant Attorney General for Antitrust, before the Senate Comm. on the Judiciary Concerning S. 1300 (July 29, 1985).

some rather than all of the persons that have participated in an antitrust conspiracy, or to collect an antitrust judgment from less than all liable defendants, or to enter into settlement agreements with some defendants for relatively small sums and shift the balance of those defendants' damage liability to nonsettling defendants, who then face increased pressure to settle rather than litigate regardless of the merits of their defense--the "whipsaw" settlement problem. The extent to which any of these scenarios are causing significant difficulties in antitrust litigation, and how best to alleviate such difficulties, have been the subject of congressional hearings, scholarly articles, and intense debate within the antitrust bar.

The Administration believes that whipsaw settlements can and do result in unwarranted and unintended unfairness to antitrust defendants and should, to the greatest extent practicable consistent with antitrust law enforcement goals, be eliminated.

The Committee currently has before it for consideration two bills that would solve the whipsaw settlement problem: S. 1300 and S. 2162. S. 1300 would eliminate joint and several liability in horizontal price-fixing cases. By making defendants liable only for treble the damages caused by their individual sales or purchases, S. 1300 would also eliminate the possibility of whipsaw settlements in those cases to which it applies.

The Administration's proposal, S. 2162, would make a number of improvements in antitrust remedies, generally It would restrict punitive treble damages to those cases where the conduct involved is highly likely to be anticompetitive, and would provide defendants' attorneys' fees for truly frivolous or bad faith antitrust lawsuits. Both of these changes would reduce, to some extent, the impact of whipsaw settlements. Most important in this regard, however, Title IV of S. 2162 would provide a right of claim reduction for all antitrust damage cases. Claim reduction requires a court to deduct from a plaintiff's remaining claim the damages fairly allocable to any person whom the plaintiff has released from liability if that amount is greater than the actual settlement amount. This would substantially eliminate the possibility of whipsaw settlements.

While both S. 1300 and S. 2162 would address the problem of whipsaw settlements and thereby increase the fairness of the antitrust damage remedy, the Administration opposes the approach taken by S. 1300. Although increasing fairness in antitrust litigation is an important consideration, the Administration's first concern must be to maintain appropriate levels of deterrence. The entire thrust behind S. 2162 is to adjust antitrust remedies to preserve or increase deterrence of hard-core antitrust offenses while reducing deterrence of potentially procompetitive conduct. In our view, S. 1300's elimination of joint and several liability would decrease deterrence of hard-core antitrust violations to an unacceptable degree--a problem avoided by the claim reduction proposal in S. 2162.

As previously discussed before the Committee by Mr. Rule in his testimony on S. 1300 in July 1985, deterrence depends upon a person's perception of his or her expected liability from committing an offense as well as the variability of that liability (the range between the lowest and highest possible penalty). As expected liability and variability increase, so too does deterrence of risk averse firms.

Eliminating joint and several liability would reduce the probability that a violation would be detected and pursued through damage actions by reducing the expected recoveries of potential plaintiffs. With individual treble-damage liability, plaintiffs would have to name and successfully collect damages from each person liable for their injury, and bear increased litigation costs if they lose. Given a reduction in expected recoveries, potential plaintiffs' incentives to detect and prosecute violations would decrease.

For basically the same reasons that eliminating joint and several liability would dampen plaintiffs' incentives to detect and pursue violations, it would also, and to the same extent, reduce defendants' expected liability *ex ante* (i.e., before engaging in unlawful conduct). Eliminating joint and several liability also would clearly reduce the variability of liability, since a single firm could no longer be potentially liable for the entire amount of the plaintiff's damages. If firms are risk averse, as virtually all economists believe, then this would further reduce deterrence.

Claim reduction would not reduce deterrence to the same extent as eliminating joint and several liability. Claim reduction would not prevent a plaintiff from recovering all of its damages from any one defendant. It could require the plaintiff to litigate over the assignment of liability among defendants, but only in cases in which the plaintiff is unable to reach a global settlement. Because claim reduction eliminates the possibility of a defendant's actual, out-of-pocket liability being magnified by sweetheart settlements, claim reduction would reduce the variability of liability, but again not to the same extent as eliminating joint and several liability. Thus, claim reduction would have a lesser effect on deterrence than eliminating joint and several liability while substantially eliminating whipsaw possibilities.

We also compared the additional burdens that eliminating joint and several liability and providing a right of claim reduction might impose on the judicial system. Each alternative would increase somewhat the litigation that might be required to resolve antitrust disputes.

Eliminating joint and several liability would necessarily require plaintiffs to file individual lawsuits against each of the many parties that may be responsible for their injury. In addition, defendants would be less likely to settle if their maximum liability were fixed at treble the damages caused by their own conduct, thus again increasing the litigation burden on the judicial system.

The only additional litigation that could arise from claim reduction would be over a settled defendant's fair share of the plaintiff's damages, in order that that amount might be deducted from the plaintiff's remaining claim. Such litigation would be relatively simple where shares are sales-based, but more complicated where relative fault and relative benefit are used. For this reason, we intend that courts use the sales-based formula in our proposal whenever it would result in a fair allocation. Since the great majority of cases are settled completely before the damage phase is reached, of course, in the typical case no additional litigation would be required by claim reduction. In short, claim reduction is preferable to eliminating joint and several liability as far as increased judicial burdens are concerned.

In sum, claim reduction is a preferable solution to the whipsaw settlement problem from both the deterrence and judicial burden standpoints.

This is not to say, of course, that any solution--including S. 2162--is perfect. For instance, we have heard the concern raised that S. 2162 might not adequately remedy the whipsaw problem if plaintiffs changed their whipsaw tactics and simply chose not to sue or settle with some culpable parties. Some leaders of the antitrust bar tell me that the dynamics of damage litigation would operate to alleviate this concern if plaintiffs were required to join all culpable parties as defendants in price-fixing treble-damage actions. Such joinder could facilitate fair settlements with accompanying claim reduction, or fair sharing agreements that would frustrate unfair whipsaw settlement tactics.

The Department would have no objection to modification of the Administration's claim reduction proposal to require plaintiffs to join as defendants culpable parties whose sales figure into their damage calculations or else face reduction of their claims by the fair share of damages attributable to such parties. In fact, our assessment of the relative costs and benefits of claim reduction as a solution to the whipsaw problem--in terms of deterrence and increased burdens on the judicial system--has largely assumed that plaintiffs will typically sue all culpable parties. Thus, such a modification really would not change what we believe to be the best solution to the fairness concerns that have been raised as a result of the joint and several liability antitrust damage rules, but would alleviate any unfairness problem plaintiffs could create by suing only some of the appropriate defendants. We would be happy to work with the Committee in perfecting the appropriate language.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions the Committee may have.

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

15 APR 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your letter of April 15, 1986, enclosing questions on S. 1300 and S. 2162 on behalf of Senators Leahy and Specter, as follows:

Questions Submitted by Senator Leahy

> Q. The Committee has heard substantial criticism of the "whipsaw effect" which commonly occurs as antitrust cases move toward settlement. Under current law, all defendants, if found liable, are jointly and severally responsible for the total amount of the plaintiff's treble damages. If the plaintiff settles with any of the defendants, the plaintiff's remaining claim is reduced only by the amount of the settlement, not by the fair share of the damages allocable to the settling defendants. Is it not true that the practical effect of the current system is to encourage the most active members of an antitrust conspiracy to settle early, in what might be termed "sweetheart" deals, leaving those defendants who maintain their innocence to bear the brunt of the damages?

A. The current joint and several liability and other damage rules cited in this question can indeed induce defendants in an antitrust case to seek early settlements with the plaintiff, in the hope that the plaintiff will accept relatively small amounts, perhaps to finance the litigation or in return for assistance in its prosecution. Both parties to such a settlement realize that under existing law, the plaintiff will be able to shift the burden of paying the rest of the damages attributable to the settling defendant's sales to the remaining defendants. It is reasonable to assume that defendants against whom the plaintiff's case is the strongest, or who are responsible for large proportions of the damages, would have the greatest incentives to negotiate early, favorable settlements.

> Q. Does this whipsaw effect increase the potential liability to such an extent that innocent defendants cannot afford to pursue their claims to trial?

A. We are informed that the risk of treble damage liability, particularly in large, industry-wide class action cases, can be so great as to make a defense on the merits impossible where "sweetheart" settlements have eliminated other defendants as potential co-payors of plaintiff's judgment. Given the inherent uncertainties of litigation, and the fact that damages calculated on the basis of industry-wide overcharges may dwarf the net worth of some defendants, claims that firms will settle rather than "bet the company" on even a meritorious defense appear quite credible.

> Q. Right now the Committee has before it S. 1300. This bill would limit liability in price fixing cases to treble the damages attributable to the defendant's purchases or sales. Does this approach have an adequate deterrent effect on potential antitrust violators? How can we increase the deterrent effect while simultaneously providing adequate room for innocent defendants to pursue their legal and factual claims?

As indicated in my Statement of April 15 before the Committee, and in the Statement of then Acting Assistant Attorney General Charles F. Rule on S. 1300 before the Committee on July 29, 1985, the Administration believes that eliminating joint and several liability in the manner of S. 1300 would have serious adverse effects on the deterrence of hard core antitrust violations, such as price fixing. We believe that the claim reduction approach of S. 2162 to the whipsaw problem is superior to S. 1300 in this regard.

> Q. Is there any reason why price fixers should be treated differently than other joint tortfeasors?

A. While there are conceptual similarities between price fixing and other conspiratorial torts that bear on joint and several liability and other damage rules, we believe that the coincidence of treble damages and class actions implicating the sales of entire industries for substantial periods of time counsel consideration of the whipsaw problem in antitrust as unique.

The Department does believe that claim reduction as a solution to this problem in the antitrust area should apply to all antitrust cases, not just price fixing, and S. 2162 so provides. There may be differences in the precise way in which claim reduction should apply to price fixing and other violations, for example, in the formula for determining how a plaintiff's claim should be reduced by a settlement. I also note in this regard that we have been informed that whipsaw settlement tactics might be altered to intentionally exclude some co-conspirators as defendants if claim reduction were enacted in the manner of S. 2162 as introduced. As I indicated in my Statement of April 15, the Administration would have no objection to modification of S. 2162 so as to require plaintiffs to name as defendants all those responsible for antitrust overcharges or else face appropriate claim reduction. Such a modification probably should be limited to horizontal conspiracy cases, to avoid plaintiffs' being compelled to name as defendants numerous parties who might be only peripherally related to the alleged conspiracy. In practice, such a modification would apply primarily to price-fixing cases.

> Q. Doesn't S. 1300 carry with it the danger that its approach to damages in the price fixing context will become the model for limiting damages in other areas of the law where the threat of exposure due to joint and several liability serves as a deterrent to tortious or otherwise harmful conduct?

A. As indicated in my answer to the previous question, I believe that the whipsaw settlement problem in antitrust is in substantial part caused by the coincidence of treble damage liability and industry-wide class actions. I do not believe that its solution should be seen as precedent for any other area.

> Q. Antitrust litigation is often described as the most complicated example of complex commercial litigation. How can we best minimize complications in assessing damages in antitrust settlements?

A. The Administration believes that potential burdens on the judiciary, like effects on deterrence, are most relevant in considering proposed alternative solutions to the whipsaw settlement problem. As I indicated in my Statements to the Committee of March 21 and April 15, claim reduction, as proposed in S. 2162, is superior in this regard both to eliminating joint and several liability in the manner of S. 1300 and to providing a right of contribution. The only additional litigation that could be generated by claim reduction would be over a settled defendant's fair share of the plaintiff's damages, in order that such amount could be deducted from the plaintiff's remaining claim. In horizontal price-fixing cases, where the whipsaw settlement problem is said to be most severe, such an allocation should be relatively straightforward.

Question Submitted by Senator Specter

> Q. In light of the Supreme Court's decision in Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), how would S. 2162 operate in situations where only one of the several defendants is joined, as opposed to situations where all of the possible defendants are joined in the suit?

A. S. 2162 reduces the claim of the plaintiff by the fair share of damages of any person released from liability, regardless of whether that person is ever actually made a defendant in a formal antitrust complaint. Thus, where one defendant is sued, and others are released through settlements without suit, the claim reduction principle of S. 2162 would be fully operative.

As I indicated in my statement of April 15, however, we are informed that S. 2162 might lead plaintiffs to shift their whipsaw settlement tactics, and intentionally leave culpable parties out of their lawsuits (and not release such parties in out-of-court settlements) in order to bring whipsaw pressure to bear on the named defendants. We are also informed that the dynamics of damage litigation would likely lead to fair settlements or sharing agreements that would counter such a whipsaw effect if plaintiffs were required to name as defendants all those whose overcharges are part of their damages, or else face claim reduction as if they had released such parties. We would have no objection to modification of S. 2162 along these lines: our analysis of the effects of claim reduction on deterrence and on the judicial system were in fact predicated on the assumption that plaintiffs typically sue or otherwise demand compensation from all culpable parties to an antitrust conspiracy.

* * * * *

I hope my answers to these questions will assist the Committee in its deliberations on S. 1300 and S. 2162.

Sincerely,

Douglas Ginsburg

Douglas H. Ginsburg
Assistant Attorney General

The **Chairman**. Mr. Ginsburg, in your view, what are the advantages of the modification you mentioned over S. 1300?

Mr **Ginsburg**. Well, the principal advantage, Mr. Chairman, is that it eliminates the concern that a plaintiff will sue only certain defendants and obtain from them recoveries that were really attributable to activities of other parties that it did not sue.

Counsel have raised this concern with me pointing, for instance, to situations where the plaintiff has a continuing relationship with one of its suppliers and fails to name it as a defendant and instead shifts that supplier's liability onto the backs of other parties that it names as defendants.

That would seem unfair, and while there seem to be only a few instances that we can find where this has happened in the past, I think that the members of the bar that I have spoken with are correct in pointing out that this could become the abuse of the future, and we could very readily curtail it right now.

The **Chairman**. I think those are all the questions I have to propound to you.

Are you going to be able to stay and hear the rest of the witnesses this morning?

Mr. **Ginsburg**. Mr. Chairman, I will be able to stay for a time, but if I am called away, I hope it is satisfactory if Mr. Cannon stays on my behalf.

The **Chairman**. Well, he is a good antitrust lawyer; we will be pleased to have him.

Mr. **Ginsburg**. Thank you very much, Mr. Chairman.

The **Chairman**. Thank you. Now we are going to move on to the panel: Mr. Dirk Soutendijk, vice president, general counsel, and secretary, Union Camp Corp.; Mr. Alan Wiseman, on behalf of the U.S. Chamber of Commerce; Mr. James T. Halverson, Antitrust Section, American Bar Association; Laddie Montague of Berger & Montague, Philadelphia, PA; and Mr. Lloyd Constantine, assistant attorney general of the State of New York.

Gentlemen, please have a seat.

Mr. Soutendijk, you may proceed.

STATEMENT OF A PANEL, INCLUDING: DIRK SOUTENDIJK, VICE PRESIDENT, GENERAL COUNSEL, AND SECRETARY, UNION CAMP CORP., WAYNE, NJ, ON BEHALF OF COALITION FOR ANTITRUST REMEDIES REFORM; ALAN WISEMAN, ESQ., HOWREY & SIMON, WASHINGTON, DC, ON BEHALF OF U.S. CHAMBER OF COMMERCE; JAMES T. HALVERSON, ESQ., SHEARMAN & STERLING, NEW YORK, NY, AND CHAIRMAN, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION; H. LADDIE MONTAGUE, JR., ESQ., BERGER & MONTAGUE, PHILADELPHIA, PA; AND LLOYD CONSTANTINE, ASSISTANT ATTORNEY GENERAL, STATE OF NEW YORK, NEW YORK, NY

Mr. SOUTENDIJK. Thank you, Mr. Chairman.

I am vice president, general counsel, and secretary of Union Camp Corp., a paper and forest products company employing more than 15,000 people.

As you may recall, Mr. Chairman, Union Camp Corp. just recently constructed a mill in your home State.

The CHAIRMAN. I am glad they restored that beautiful home down there. If I had had the money to buy that place and have it restored, I would have done it myself. But it took $750,000, I understand, that you all spent on it. And I am very pleased that you restored it. It is one of the prettiest homes I have ever seen.

You may proceed.

Mr. SOUTENDIJK. Mr. Chairman, I am also chairman of the Legal Committee of the American Paper Institute. But today, I am representing the Coalition for Antitrust Remedies Reform, which is an informal coalition of about 25 corporations and major business groups dedicated to seeking reform in the antitrust remedies system.

Mr. Chairman, the coalition has submitted a prepared statement. In the interest of brevity, if you will permit me, I will simply summarize our remarks.

The CHAIRMAN. Yes. Your entire statement will go in the record, and if you could just give us the thrust of it.

Mr. SOUTENDIJK. The coalition strongly supports S. 1300 as the best solution to the inequities inherent in the present system of antitrust remedies. Under this proposed legislation, each company's treble damage liability would reflect the individual consequences of that company's own actions, and every antitrust defendant would have to stand or fall on the strength of its own defense. No longer would it be possible for an innocent company to be coerced into an exorbitant settlement by the threat of being held liable for an entire industry's treble damages.

Like S. 1300, the administration's claim reduction proposal was also developed as a response to this perceived need to redress the great potential for abuse in the existing system. Under the claim reduction approach set forth in the administration's bill, the damage claim of an antitrust plaintiff that has settled or released a defendant from liability would be reduced by at least the proportionate share of that claim allocable to the settling defendant. The nonsettling defendants would remain jointly and severally liable for the remainder of the plaintiff's damages.

While both the claim reduction rule embodied in the administration's bill and the individual treble damage responsibility concept of S. 1300 are designed to redress the same unfairness, the coalition continues to believe that S. 1300 is the better approach. For although claim reduction would alleviate the problem of settlement abuse, it would not provide relief in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged coconspirators.

Senate bill 1300 has received the endorsement of a bipartisan majority of this committee and is widely supported by members of the business community and the bar.

However, the Department of Justice has raised concerns regarding the bill's modification of joint and several liability in private antitrust litigation. Our coalition believes that these concerns are misplaced since, as I have mentioned, S. 1300 would still preserve the principle of joint and several liability where it is necessary to accomplish its basic objective--namely, to make plaintiffs whole.

Nevertheless, the coalition believes that it may be possible to develop a fair compromise between S. 1300 and the administration's claim reduction approach. We would offer two specific changes.

First, it should be made clear that in a horizontal conspiracy case, a defendant who has not been joined would be treated the same way as a defendant who has been released from liability by the plaintiff. Accordingly, claim reduction would apply, and the plaintiff's recovery would be reduced by the amount of overcharges or underpayments attributable to the nonjoined defendant. Second, the proposal could be amended to make it clear that purchases and sales are the exclusive basis for allocating damages in horizontal price-fixing cases.

Mr. Chairman, a compromise of this kind would not entirely solve the potential for abuse in the antitrust remedies process because defendants would continue to remain jointly and severally liable for an entire industry's treble damages regardless of relative size, market share, or fault. Thus, an innocent defendant with a small market share might still be vulnerable to coercive settlement pressure by the threat of disproportionate liability for the damages attributable to the defendants that proceed to trial.

However, such a compromise would provide needed relief in the most egregious situations of whipsaw settlements and nonjoinder of defendants. Accordingly, while the coalition continues to support S. 1300 as the best solution to the antitrust remedies problem, we could also support the kind of compromise approach I have just described.

Mr. Chairman, the coalition once again wishes to reiterate our thanks to you and to the other members of the Senate Judiciary Committee who have worked tirelessly with the business community, with the bar, and with the administration to help forge a fair and effective consensus with all responsible parties.

We pledge our continued support in this effort, and we stand ready to assist this committee and Congress in any way we can in expediting the enactment of this badly needed legislation.

Thank you.

The **Chairman**. Thank you, Mr. Soutendijk.

[Prepared statement and responses to questions follow:]

STATEMENT BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARINGS ON S. 1300 AND TITLE IV OF THE ADMINISTRATION'S PROPOSED "ANTITRUST REMEDIES IMPROVEMENT ACT OF 1986"

BY

DIRK SOUTENDIJK
ON BEHALF OF THE COALITION FOR
ANTITRUST REMEDIES REFORM

APRIL 15, 1986

Good morning. My name is Dirk Soutendijk. I am Vice President, General Counsel, and Secretary of Union Camp Corporation, a paper and paper products manufacturing company employing more than 15,000 people throughout the United States. I am also the Chairman of the Legal Committee of the American Paper Institute. Today, however, I am testifying on behalf of the Coalition for Antitrust Remedies Reform, an informal coalition of more than twenty-five companies and major business groups dedicated to seeking reform which will promote fairness in the administration of antitrust remedies. The Coalition has been working with this Committee, and the legal and business communities for the last year in an effort to have enacted into law S. 1300, a bill that would provide for individual treble damage responsibility in price-fixing and similar cases.

The Coalition has strongly supported S. 1300 as the best solution to the inequities inherent in the present system of antitrust remedies. As Ira Millstein and Judge Griffin Bell testified before this Committee last July, S. 1300 solves the problems caused by the haphazard combination of joint and several liability with treble damages, class actions and lenient standards of proof, by modifying one of these elements - joint and several liability - to provide for individual treble damage responsibility.

Under this legislation, each company's treble damage liability would reflect the individual consequences of its own actions, and every antitrust defendant would have to stand or fall on the strength of its own defense. No longer would it be possible for innocent companies to be coerced into exhorbitant settlements by the threat of being held liable for an entire industry's treble damages. Yet, S. 1300 would still preserve joint and several liability in those two situations where it might be necessary to make plaintiffs whole - where one of the alleged co-conspirators is financially incapable of satisfying a judgment against it or beyond the jurisdiction of the courts.

Like S. 1300, the Administration's claim reduction proposal was also developed in response to the perceived need to redress the great potential for abuse in the existing system of antitrust remedies. Under the claim reduction approach set forth in the Administration's bill, the damage claim of an antitrust plaintiff that has settled or released a defendant from liability would be reduced by at least the proportionate share of that claim allocable to the settling defendant. The nonsettling defendants would remain jointly and severally liable for the remainder of the plaintiff's damages.

While both the claim reduction rule embodied in the Administration's bill and the individual treble damage responsibility concept of S. 1300 are designed to redress the same unfairness, the Coalition believes that S. 1300 is the better approach. For although claim reduction would alleviate the problem of settlement abuse, it would not provide relief in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged co-conspirators.

Specifically, the basic problem with the Administration's claim reduction proposal is that it provides no relief in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged co-conspirators, holding the named defendants liable for three times the damages caused by those companies that are not joined as defendants.[1] As Assistant Attorney General Baxter explained in 1982, such a claim reduction approach would only deal with the problem of settlement abuse; it would not address at all "the other major fairness concern" with joint and several liability - the possibility that some antitrust violators will not be sued at all.[2]

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[1] See e.g., Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (plaintiff only sued one of four alleged participants in a conspiracy to fix the price of ready-mix concrete and held that company responsible for all of the treble damages caused by the alleged conspiracy); Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979) (plaintiff only sued one of five alleged price fixers for damages and held that individual company (with only 11.8% of the relevant market) liable for all of the treble damages caused by the alleged conspiracy (more than twenty times the plaintiffs' own original estimate of the defendant's share of the damages); City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F.23 (6th Cir. 1903)
(footnote continued)

S. 1300, on the other hand, eliminates the potential for joint and several liability abuse in both the settlement and litigation process by making each violator individually responsible for treble the damages attributable to its own purchases or sales. Thus, under S. 1300, a plaintiff would be encouraged to join as defendants all those who have assertedly caused it harm in order to recover its full treble damages.

Although S. 1300 has received the endorsement of a bipartisan majority of this Committee and is widely supported by members of the business community and the bar, the Department of Justice has raised some concerns regarding the bill's modification of joint and several liability in private antitrust litigation. Our coalition believes these concerns are misplaced since, as mentioned above, S. 1300 would still

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(plaintiff chose to sue only those members of an alleged bid rigging conspiracy from whom it did not make any purchases).

2. Letter from Assistant Attorney General William F. Baxter to the Honorable Peter R. Rodino, Jr. (July 30, 1982) (copy attached) at p. 564.

preserve the principle of joint and several liability where it is necessary to accomplish its basic objective - to make plaintiffs whole.[3] Nevertheless, the Coalition believes that it may be possible to develop a fair compromise between S. 1300 and the Administration's claim reduction approach. We recommend two specific changes:

First, it should be made clear that in a horizontal conspiracy case, a defendant who has not been joined would be treated the same way as a defendant who had been released from liability by the plaintiff. Accordingly, claim reduction would apply, and the plaintiff's recovery would be reduced by the amount of overcharges or underpayments attributable to the non-joined defendant. Second, the proposal could be amended to make it clear that purchases and sales are the exclusive basis for allocating damages in horizontal price fixing cases.

With these two changes, the Coalition believes that the Administration's proposal would provide needed relief in most of the situations in which the greatest abuses have occurred. The problem of plaintiffs deliberately choosing not to join all alleged co-conspirators would be solved, and

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3. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) ("joint and several liability simply insures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants").

needed certainty would be provided in the allocation of damages in horizontal price fixing cases (where sales or purchases have long been recognized as the appropriate basis for allocation).[4] At the same time, the concept of joint and several liability would be fully preserved and, to the extent that the Administration and others believe that such liability helps to deter anticompetitive behavior, that deterrence would also remain intact.

A compromise of this kind would not entirely solve the potential for abuse in the antitrust remedies process because defendants would continue to remain jointly and severally liable for an entire industry's treble damages regardless of relative size, market share, or fault. Thus, an innocent defendant with a small market share might still be vulnerable to coercive settlement pressure by the threat of disproportionate liability for the damages attributable to the defendants that proceed to trial. However, a compromise would provide needed relief in the most egregious situations of whipsaw settlements and non-joinder of defendants. Accordingly, while the Coalition continues to support S. 1300 as the best solution to the antitrust remedies problem, we could also support the type of compromise approach I have just described.

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[4] See Report of the Senate Judiciary Committee on S. 995, S. Rept. No. 97-359, 97th Cong., 2d Sess. (1982).

The Coalition once again wishes to reiterate our thanks to Chairman Thurmond and the other members of the Senate Judiciary Committee who have worked tirelessly with the business community, the bar, and the Administration to help forge a fair and effective concensus which all responsible parties can endorse. We pledge our continued support in this effort and stand ready to assist this Committee and Congress in any way that we can in expediting the enactment of this badly needed legislation.

Hearing on S. 2162 - Antitrust Remedies Improvements Act of 1986

Question Submitted by Senator Arlen Specter:

As the representative for various companies and businesses seeking to reform existing antitrust remedies, what changes, if any, do you think need to be made in the proposed legislation?

Answer:

Although the Coalition for Antitrust Remedies Reform believes that S. 1300 is the best approach for redressing the unfairness inherent in the existing system of antitrust remedies, in recognition of the concern expressed by the Department of Justice regarding the elimination of joint and several liability, the Coalition believes it is possible to modify the Administration's proposed legislation to the satisfaction of proponents of both S. 2162 and S. 1300.

As I suggested during Tuesday's hearing, the Coalition recommends amending the Administration's proposal in two ways: first, the legislation should make clear that in a horizontal conspiracy case, non-joined defendants will be treated the same way as a defendant who has been released from liability by the plaintiff. Consequently, under the claim reduction approach set forth in S. 2162, the plaintiff's recovery would be reduced by the amount of overcharges or underpayments attributable to those defendants who have not been joined in the action. The second change that we would propose is that S. 2162 be amended to make it clear that purchases and sales are the exclusive basis for allocating damages in horizontal price fixing cases.

Question posed by Senator Paul Simon:

Can you suggest any alternatives to S. 1300 and S. 2162 that would solve the problems that have been associated with the existing system of antitrust remedies?

Answer:

It is the Coalition's view that a compromise between S. 1300 and S. 2162 might be the most appropriate way to solve the bulk of the problems inherent in the existing system of antitrust remedies without either sacrificing the broad consensus support that S. 1300 enjoys or ignoring the concerns that the Department of Justice has raised regarding the elimination of joint and several liability.

The two specific changes that I have set forth above in response to Senator Specter's questions form the substance of such a compromise. By implementing these changes, the Administration's proposal would provide needed relief in most of the situations in which the greatest abuses have occurred. At the same time, the concept of joint and several liability would be preserved and, to the extent that the Administration and others believe that such liability helps to deter anticompetitive behavior, that deterrence would remain intact.

The CHAIRMAN. Mr. Wiseman, from the U.S. Chamber of Commerce.

Your entire statement will go in the record, and if you could just give us the thrust of it in about 5 minutes.

STATEMENT OF ALAN WISEMAN

Mr. WISEMAN. Yes, Mr. Chairman.

I am Alan Wiseman, a partner at the Washington, DC, law firm of Howrey & Simon, which specializes in antitrust and commercial litigation.

I am testifying today on behalf of the U.S. Chamber of Commerce. The chamber strongly supports the efforts of the administration in addressing the problem of fairly apportioning damages in private antitrust litigation, but supports S. 1300 as the preferred remedy.

Since 1979, this committee has held numerous hearings and considered a variety of solutions to address a significant problem in private antitrust litigation.

The problem, simply put, is that a company with a mere 1-percent market share is exposed to damage claims based upon 100 percent of the universe. This anomalous and unfair situation is of recent origin. It is the result of the confluence of joint and several liability, mandatory treble damages, and the modern-day class action procedure which occurred in 1966.

Following the amendments to rule 23 in 1966, and the abuses began to occur in the early 1970's, a legislative correction was promptly sought, beginning in 1979 when Senator Bayh introduced contribution/claim reduction legislation.

The proposed legislation is not an attempt to undo 100 years of antitrust law. Under current law, plaintiffs can effectively undermine the antitrust remedial scheme by settling with companies for far less than the damages attributable to their conduct; shifting their liability to nonsettling companies. The present law thus encourages the most culpable antitrust violator, who knows from the beginning that he cannot go to trial, to rush to settlement. In contrast, the company that believes he is innocent is the least likely to rush to trial, but now he finds himself exposed to damage claims based not only on his own sales, but the sales of the more culpable defendant who has settled.

Although companies may want to prove their innocence, this exposure to industrywide damages effectively denies them their right to trial because they have no choice but to settle.

It is important to remember that just because a complaint is filed does not mean that the defendants are in fact guilty. Most antitrust cases do not involve hard-core evidence. Consequently, the outcome of a long, protracted antitrust trial is uncertain. Both the administration's proposal, S. 2162, and S. 1300, recognize the abuses that have plagued U.S. business in private antitrust litigation and the need for reform. For many months, the U.S. Chamber with other business and legal groups searched for a solution that could gain broad-based support. S. 1300 represents the culmination of those efforts.

S. 1300 is a simple and effective solution. Each defendant must pay damages based upon its sales if found to have violated the antitrust laws. The bill does not reduce the universe of damages that can be sought by victims of a violation.

It would not reduce the total expected recovery that plaintiffs can get. And there is no empirical evidence that deterrence would be reduced.

The fundamental problem with the administration's claim reduction approach is that it provides only part of the solution. Claim reduction is not a solution in cases in which the lawyer chooses to sue less than all of the alleged coconspirators, but seeks treble damages based upon the sales of those companies that are not joined as defendants. The prospect of this happening is not speculative. In my written statement, I have cited a number of cases where this in fact has occurred, and indeed, in the Manual for Complex Litigation, the prospect is directly cited in proposed sample class action orders, where they talk in terms of damage exposure based not only upon the sales of defendants, but other manufacturers.

Under the administration's proposal, the whipsaw settlement problem is solved only in those cases in which plaintiffs seek damages based upon the sales of defendants only. Indeed, a claim reduction approach might lead to increased abuses by creative lawyers in search of enormous fees. They may deliberately seek to sue less than all the coconspirators

In conclusion, we all agree that significant abuses have occurred which undermine antitrust enforcement and that may well be anticompetitive in effect. While the administration's proposal addresses part of the problem the U.S. Chamber of Commerce strongly supports S. 1300 as a more comprehensive solution, representing the best efforts of many in the business and legal communities.

It is an important antitrust reform measure which deserves prompt consideration by Congress.

Thank you.

The CHAIRMAN. Thank you, Mr. Wiseman.

[Prepared statement follows:]

STATEMENT
on
THE INDIVIDUAL TREBLE DAMAGE REFORM ACT (S. 1300)
and
THE ANTITRUST REMEDIES IMPROVEMENTS ACT (S. 2162)
before the
SENATE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
Alan Wiseman
April 15, 1986

I am Alan Wiseman, a partner at the Washington, D.C. law firm of Howrey & Simon, specializing in antitrust and commercial litigation. For over 15 years, I have represented plaintiffs and defendants in complex antitrust litigation and participated in a number of the major antitrust class actions that gave rise to the need for this legislation.

I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation of companies, trade and professional associations, and state and local chambers of commerce. The Chamber strongly supports the efforts of the Administration in addressing the problem of fairly apportioning damages in private antitrust litigation but supports S. 1300 as the preferred remedy.

Since 1979, this committee has held numerous hearings and considered a variety of solutions to address a significant problem that has arisen in private antitrust litigation. The problem, simply stated, is as follows: Under current law, a company with a mere 1% share of a market can be liable for 100% of the damages arising out of the sales of an entire industry. This anomalous and unfair situation originated relatively recently. It is the result of the confluence of joint and several liability, mandatory treble damages, and the modern-day class-action procedure. The problems with respect to which this legislation is directed first arose in the 1970's. A legislative correction was sought promptly beginning in 1979, when Senator Bayh (D-IN) introduced contribution/claim-reduction legislation.

The proposed legislation, therefore, is not an attempt to undo a hundred years of antitrust law. While the concept of joint and several liability was introduced to private antitrust litigation by a 1906 Supreme Court decision -- City of Atlanta v. Chattanooga Foundry and Pipe Works, 127 F. 23 (6th Cir. 1903), aff'd., 203 U.S. 390 (1906) -- a case in which the total single damages awarded were under $2,000 -- the problem to which this legislation is directed did not arise until after the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, which liberalized class-action procedures.

Liberalization of the class-action rules has permitted a dramatic increase in antitrust class actions, national in scope. Under current class-action procedures, a single plaintiff, claiming damages based upon the sales of an entire industry, can bring an action on behalf of all purchasers of a product. The potential damage exposure is so enormous and the prospect of extraordinary fees is so great that a large contingent of plaintiffs' class action lawyers has developed. Rule 23 now requires a potential class member to withdraw affirmatively or it will be included in the class action. As a result, class members can literally remain passive in cases and yet recover damages.

While it is important to antitrust enforcement that private parties continue to be permitted to bring class actions in appropriate cases to recover damages from those companies that violate the law, it is also important to ensure that private litigation does not undermine antitrust enforcement. Under current law, the plaintiffs effectively can undermine the antitrust remedial scheme by settling with companies for less than the damages attributable to their conduct and shifting their liability to non settling companies. The present law, thus, encourages the most culpable antitrust violators -- which know from the beginning that they cannot go to trial -- to rush to the plaintiffs to settle first. Plaintiffs' lawyers have the incentive to accept such settlements because they wish to obtain funds to litigate the case. Those who did not settle first are often the most innocent -- but now they find their damage exposure increased dramatically by the potential liability resulting from damages based upon the sales of the settling companies and the alleged co conspirators that were not named as defendants. Antitrust enforcement is thereby undermined.

Current law also encourages anticompetitive conduct through the settlement process. The large culpable antitrust violator that settled at a discount may be able to gain a competitive advantage by shifting its liability to its smaller competitors. Companies with small market shares, which truly believe in their innocence, then are forced to settle at disproportionate amounts because they are potentially liable for damages based upon the sales of an entire industry. This prospect is not speculative. In the Corrugated Container Antitrust Litigation, M.D.L. 310 -- which this committee has heard so much about -- one defendant -- United States Corrugated Fiber Box Company -- had to sell one of its plants in order to pay more than $3 million to settle. Green Bay Packaging Company -- which has testified before this committee -- was forced to issue a promissory note to settle. Both U.S. Corrugated and Green Bay subsequently were found not even to be conspirators in the civil case that went to trial involving non settling defendants.

Although companies may want to prove their innocence, their exposure to industry-wide damages denies them their Constitutionally guaranteed right to trial. Simply filing a complaint does not mean that the defendants are, in fact, guilty. Small and even large companies may have no real choice but to settle to avoid gargantuan damage exposure. Either they forego their Constitutional right to establish their innocence at trial and capitulate to plaintiffs' lawyers' settlement demands, or they may bet the very existence of their company by proceeding to trial and risking an adverse jury verdict. Because of the complicated nature of many antitrust violations and the uncertainties attached to the outcome of a protracted antitrust trial, very few, if any, companies, as a practical matter, exercise their right to a trial. They effectively are denied access to the courts.

Both the Administration's proposal(S. 2162) and S. 1300 recognize the abuses that have plagued U.S. business in private antitrust litigation and the need for reform. Prior to 1985, the problems of combining joint and several liability, mandatory treble damages, and class actions have lacked a solution that the entire business community could support. For many months, the

U.S. Chamber, with other business and legal groups, searched for a solution that could gain broad-based support. S. 1300 represents the culmination of those efforts.

S. 1300 is a simple and effective solution. Each defendant must pay damages based upon its sales if it is found to have violated antitrust laws. The bill does not reduce the damages that can be sought by victims of a violation.

The fundamental problem with the Administration's claim-reduction approach is that it provides only part of the solution to the problem. Claim reduction is not a solution in cases in which the lawyer chooses to sue less than all of the alleged co conspirators but seeks treble damages based upon the sales of those companies that are not joined as defendants. The prospect of this happening is not speculative.

In In Re Cement and Concrete Antitrust Litigation, M.D.L. 296, the district court certified a national class consisting of all public and private entities within the United States "that have purchased cement or cement-containing products from any defendant or any cement manufacturer or producer . . . for delivery within the United States at any time between January 1, 1968, and December 31, 1976." (Emphasis added.) The claims were not limited to purchases from the defendants.

In In Re Chicken Antitrust Litigation, C.A. No. C74-2454A (N.D. Ga.), the district court, for settlement purposes, certified classes on behalf of all entities "who purchased during the relevant period Broilers directly from any defendant . . . or from any other person, firm, corporation, entity or other organization which slaughtered and processed Broilers, or any affiliate thereof." (Emphasis added.) Plaintiffs' complaints had sought damages based upon sales of defendants and others.

In the Plywood Antitrust Litigation, M.D.L. No. 159, certain of the complaints were brought against only seven defendants seeking damages based upon all purchases of plywood from not only the defendants but also any co conspirator. Other complaints in that litigation named more than seven defendants. The district court certified classes on behalf of those business entities throughout the United States and its territories that purchased softwood plywood from the manufacturers thereof -- the claims were not limited to purchases from the defendant.[1]

In In Re Arizona Dairy Products Litigation, No. CIV 74-569A PHZ CAM (D. Arizona), plaintiffs, on behalf of a class, seek damages against the defendants based upon not only defendants' sales of milk but also the sales of numerous unnamed co conspirators.

In Olson Farms, Inc. v. Safeway Stores, Inc., 69 F.2d 1370 (10th Cir. 1979) (not a class action), the plaintiffs only sued one of five alleged co conspirators and held that company (with 11.8% of the market) liable for all of the treble damages caused by the alleged conspiracy (more than twenty times the plaintiffs' own original estimate of the defendant's share of the damages).

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[1] In Re Plywood Antitrust Litigation, 76 F.R.D. 570, 587 (E.D. La. 1976); In Re Plywood Antitrust Litigation, 655 F. 2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1125 (1983).

Indeed, in the Manual for Complex Litigation Second, sample class-action orders are included that provide that the plaintiffs can maintain a class action, as follows:

> All persons and entities throughout the United States and its territories . . . that, since , 19 , have purchased widgets directly from any of the defendants or from any other widget manufacturer.
>
> . . . .
>
> with respect to the following cause(s) of action:
>
> . . . .
>
> Any claims for damages . . . under federal antitrust laws premise upon an alleged conspiracy among the defendants and other widget manufacturers. . . . (Emphasis added.)

While in many cases plaintiffs' lawyers have sought damages based upon the sales of defendants only, in many other cases it is clear that plaintiffs have sought damages from the defendants based upon the sales of co conspirators not named as defendants. Under the Administration's proposal, the "whipsaw" settlement problem is solved only in those cases in which plaintiffs seek damages based upon the sales of defendants only.

Indeed, a claim-reduction approach might lead to increased abuses by creative lawyers in search of enormous fees. They may find it in their self-interest deliberately to refrain from suing some of the alleged co conspirators in order to coerce windfall settlements from those that are sued. The result would be a continuation of the "whipsaw" settlement problem. Also, those antitrust violators not sued would not have to pay their fair share of damages resulting from their illegal conduct.

In conclusion, we all agree that significant abuses have occurred that undermine antitrust enforcement and that may well be anticompetitive in effect. While the Administration's proposal addresses part of the problem, the U.S. Chamber of Commerce strongly supports S. 1300 as a more comprehensive solution, representing the best efforts of many in the business and legal communities. It is an important antitrust reform measure that deserves prompt consideration by Congress. Thank you.

The CHAIRMAN. Mr. Halverson, I believe you are chairman of the Antitrust Section of the American Bar Association, are you not?

STATEMENT OF JAMES T. HALVERSON

Mr. HALVERSON. Yes, Mr. Chairman.

Mr. Chairman, thank you for inviting me. I am a partner in the New York law firm of Shearman & Sterling. I am appearing here today in my individual capacity and not in my capacity as chairman of the Section of Antitrust Law of the American Association. We have complicated procedures which we have not yet had time to go through for approval; thus, my remarks have not been approved by the American Bar Association and should not be construed to represent the views of the ABA.

I am speaking on my own behalf.

On September 17, 1985, 14 former chairmen of the section on antitrust law and I submitted a report to this committee which is in the record, strongly supporting S. 1300. Therefore, Mr. Chairman, I will summarize my views toward S. 1300 and title IV of S. 2162.

Title IV of S. 2162, the administration's proposed Antitrust Remedies Improvement Act of 1986, would establish new rules for reducing the claim of an antitrust plaintiff which has settled with and released a defendant or potential defendant from liability.

Under the approach set forth in the bill, which would amend section 4 of the Clayton Act, the damage claim of an antitrust plaintiff which has settled with and released a defendant from liability would be reduced by at least a proportionate share of the claim fairly allocable to the settling defendant. The nonsettling defendants would remain jointly and severally liable for the remainder of the plaintiff's damages. The claim reduction rule would apply to all private antitrust actions.

As in the case of S. 1300, the administration's proposal was developed in response to the perceived need to redress an unfairness inherent in the existing system of antitrust remedies law. Under the principle of joint and several liability, the antitrust defendant is liable for the treble damages caused not only by its own acts, but also for treble damages attributable to the acts of all other alleged coconspirators. And there is no right of contribution among alleged antitrust coconspirators.

The current potential for open-ended liability drives innocent companies toward settlement once some other defendants have settled, probably for less than their fair share. As more defendants settle, the pressure on remaining defendants increases, and a plaintiff will generally seek to settle with them at disproportionately higher amounts than the earlier settlements. Such "whipsawing" is undesirable from the standpoint of antitrust policy, since it renders irrelevant the guilt or innocence of the defendants as well as the amount of damage actually caused by a particular party.

Liability instead may be apportioned according to the whims of a plaintiff, rather than in accordance with any concept of culpability.

S. 1300, Mr. Chairman, the bill introduced by you, provides that an antitrust law violator in horizontal cases alleging acts affecting price would be subject only to treble the damages attributable to its sales or purchases of goods or services in the affected industry.

Thus, the legislation would eliminate joint and several liability only in cases challenging agreements among competitors in which the damages awarded are based on impact on price. Liability would be apportioned on the basis of overcharges or underpayments attributable to a particular defendant's sales or purchases.

Those who believe in S. 1300 believe that this approach to damage allocation would bring about a more desirable balance than now exists between the parties in conspiracy litigation brought to recover overcharges. By making such defendants liable only for the injuries attributable to that defendant, the size of a defendant's potential liability will in most cases bear a natural and logical relationship to the size of the company's sales in relation to the affected market and potential liability for injury caused by others will no longer operate to coerce unfair settlement.

Now let me pass to a comparison which you asked me to do between the two bills.

While both the claim reduction rule embodied in the administration's bill, S. 2162, and the individual treble damage liability concept of S. 1300, have been developed in response to the need to redress abuses in the existing system, the two approaches differ.

Although the administration's and other claim reduction proposals would alleviate the problem of settlement abuse, it would not redress the inequities in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged coconspirators.

In contrast, S. 1300 eliminates the potential for joint and several liability abuse in both the settlement and litigation process, because each company's potential treble damage liability could not exceed the individual consequences of its own actions.

Thus, a plaintiff would be encouraged to join as defendants all those who have assertedly caused it harm in order to recover its full treble damages.

Additionally, the administration's claim reduction bill is applicable to all private damage actions, while S. 1300 is limited to cases challenging agreements among competitors in which the damages awarded are based on impact on price.

Price-affecting horizontal conspiracies are typically the type of multidefendant, industrywide liability cases in which the greatest abuses of joint and several liability have occurred and are the type of cases in which it is most appropriate to determine the individual share of damages attributable to each defendant according to its purchases or sales.

Thus, of the two approaches, claim reduction or individual treble damage liability, I prefer the S. 1300 approach.

In the event, however, that Congress wants to look to a possibility of wedding or marrying the two proposals, one such possible approach would be to preserve joint and several liability with respect to sales or purchases of all joined defendants. Such an approach could wed the best of S. 1300 and S. 2162, if joined defendants would remain jointly and severally liable as among each other, but would not be liable for injuries caused by nonjoined defendants.

One means to accomplish this is to conclusively presume that nonjoined, putative coconspirators have settled with the plaintiff

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April 22, 1986

VIA FEDERAL EXPRESS

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: S.B. 2162

Dear Senator Thurmond:

This is in reply to your letter of April 15, 1986, enclosing the questions of Senator Spector. The specific question addressed to my attention was as follows:

> What, if any, are the implications in implementing differing standards in Title III cases for defendant's attorney fees provisions as opposed to provisions applied to civil actions in general?

A direct, short answer is that Title III will act as a strong deterrent against private enforcement of the antitrust laws. There are many reasons why this deterrent is unnecessary:

A. Because almost every antitrust claim involves complex and costly litigation and a significant committment by client and attorney to substantial time and money, such litigation is not normally commenced without careful investigation and analysis being performed. This clearly is the rule, particularly in instances where the plaintiffs are small businesses or consumers. It is also the rule with respect to class actions.

that defendants that otherwise might survive in the marketplace may end up in bankruptcy.

Another reason for treating different defendants differently is some defendants are willing to disgorge the evidence which helps strengthen the case against other defendants, and that is worth something to the plaintiffs other than dollars.

Would Congress consider taking away the prosecutorial discretion of an antitrust grand jury investigation; take away the right to give a witness immunity; take away the discretion not to indict a particular company because its employees have cooperated? It would not. And that is exactly what this bill will do to private enforcement. It takes away the prosecutorial discretion in order to get the best result and a fair result for the victims of the violation.

It is not easy to win an antitrust case for a plaintiff. And if the record were shown of the cases that go to trial, a majority of them end up in verdicts for the defendant. There is a lot to overcome, and to take away from the plaintiffs the joint and several liability weapon which clearly balances the risks between the parties in attempting to reach a settlement would be a great disservice to the private enforcement of the antitrust laws.

Both of the proposed bills are clearly not for the benefit of the victim, who already rarely recovers 100 percent of his damages. But they favor the violator. The thrust of these bills is not to encourage fair compensation for the victims, but to lessen the burden of the price fixer.

This committee must decide in its wisdom if vigorous private antitrust enforcement, particularly of price-fixing violations, is desirable. If it decides yes, then these two bills are counterproductive because they hinder the victim in redressing the injury it has suffered.

Thank you very much.

The CHAIRMAN. Thank you.

[Responses to questions follow:]

The CHAIRMAN. Mr. Montague?

STATEMENT OF H. LADDIE MONTAGUE, JR.

Mr. MONTAGUE. Thank you, Mr. Chairman.

My name is H. Laddie Montague, Jr., and I am with the firm of Berger & Montague in Philadelphia, and I have specialized in class actions for price-fixing violations on the side of plaintiffs for over 20 years.

I have been involved in well over 20 pieces of litigation of that sort. Two of those cases have gone to trial; the others have either settled or been dismissed on defendants' motions.

I am opposed to both bills. I believe that they focus unfairly and improperly on the unfairness of the price-fixing violator, and they ignore the fairness to the victim of the price-fixing violator.

I do not agree that abuses have occurred, and I do not believe that there is a record before this committee, other than perhaps on an isolated instance, that there have been abuses under the private enforcement of the antitrust laws.

I have not known one defendant to go out-of-business due to a settlement or a verdict. The major complainant and proponent of this bill originally was a defendant in the *Corrugated* case, in which I was one of the trial lawyers. In that particular case, he complained of being treated unfairly.

The plaintiff's expert found damages to be 7 percent in that case. The jury disagreed and found the damages to be 5 percent over the entire period. The complaining defendant paid in settlement 2.9 percent of his company's sales for 1 year.

I do not think he was treated unfairly.

It is extremely fair where a settlement and the conclusion of an antitrust treble damage suit results in the plaintiffs or the victims of the violation receiving 100 percent of single damages. Usually the result is substantially less than 100 percent of single damages. And traditionally, the settlement is based on the statute of limitations period, which means that even if the conspiracy existed for 10 years, the recovery is limited to 4 years or less. And in a class action, since not all class members participate in the settlement, either because they opt out, or they fail to file claims, and because those that do participate recover less than 100 percent of single damages, it becomes apparent that the defendants themselves keep some of the profits which they gleaned from their illegal conduct.

Now, in almost every case, the plaintiffs settle with different defendants at different percentages of their respective sales, or whatever the measure might be. And there are very important reasons for that.

The cases vary as to strength and risks, as to different defendants. Defendants have varied financial conditions, and it would be very unfair to try to extract from a financially troubled defendant and remove him from the marketplace as much in settlement or as much of a recovery as from a very well-financed defendant.

What is going to happen to the financially weak defendants if either of these bills go through? There will be no settlements, and the cases will be tried and will go to judgment, and you will find

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April 21, 1986

The Honorable Paul Simon
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Simon:

I am writing in response to your oral questions at the hearing on S. 1300 and S. 2162 held on Tuesday, April 15. Those questions were:

1. What are the sensible answers to claims reduction without causing prohibitive costs to plaintiffs?

2. Should we have treble or five times or ten times liability, but which would not exceed 100% of total liability?

3. Why not contribution?

Obviously, plaintiffs should not be unduly burdened in their efforts to sue all those that they feel are responsible for their injury. Thus, the approach of melding S. 1300 and S. 2162 so that all joined defendants would remain jointly and severally liable as among each other, but would not be liable for injuries caused by non-joined defendants, would allow most plaintiffs to recover their full damages, either by joining all defendants in one action or, if easier, joining different defendants in different actions. This could be accomplished, as I mentioned in my testimony, by conclusively presuming that non-joined putative co-conspirators have settled with the plaintiff, and applying S. 2162's rules of claim reduction to those parties. Under this approach, it would not be necessary to raise the multiple of liability.

Contribution against other joint tortfeasors, which applies in other areas of the law, appears not to be the a practical solution in the antitrust area, because proposals to take that approach have repeatedly been rejected by Congress.

I hope that this response answers your questions. Please let me know if I can be of further assistance.

Best regards.

Sincerely,

James T. Halverson

James T. Halverson

5. *See*, *e.g.*, Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) ("joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants"). A good general discussion of the concept of apportioning liability is set forth by Littman and Van Buskirk, "The 'Dogmas' of Antitrust Actions: A New Perspective," 25 *Antitrust Bull.* 687 (1979).

6. Subsection (b)(2) provides that the limitation of liability "shall not apply to that portion of damages * * * which a claimant is unable to recover due to the financial incapacity of any person to satisfy a judgment."

7. *See*, *e.g.*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("To deny [apportionment of liability] would be to dilute the deterrent effect of the antitrust laws, since the participant in an antitrust violation could escape all liability for its wrongdoing").

8. *See*, *e.g.*, Georges Radio Inc. v. Capital Transit Co., 126 F.2d 219, 220-21 (D.C. Cir 1942):

> "[t]he knowledge of a person that he is responsible for all the consequences of a wrong will serve to restrain him, and will thus induce persons to guide themselves a little more warily against participation with others in acts which might produce tort liability."

9. As noted by the Supreme Court in Texas Industries, Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 636 n.8, (1981):

> "Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are 'risk averse'; *i.e.*, they would prefer a greater certainty of a small loss to a less certain chance of a greater loss."

10. As Assistant Attorney General Baxter explained in 1982, claim reduction would not address "the other major fairness concern" with joint and several liability - "namely, the possibility that some antitrust violators may escape damage liability entirely while others pay for their misdeeds." (Letter from Assistant Attorney General William F. Baxter to the Honorable Peter R. Rodino, Jr. at *Hearings*, p. 564 (July 30, 1982).)

11. For a thorough and thoughtful discussion of all of the issues discussed in this testimony, *see* ABA Antitrust Section, Monograph No. 11, *Contribution and Claim Reduction in Antitrust Litigation* (1986).

combination of Subsections 4 1 (a) and 4 1 (b)(2) of S. 2162.11/

Thank you, Mr. Chairman, for the opportunity to present my views.

FOOTNOTES

1. Modern communications make it possible for an alleged conspiracy to cover an entire, multi-billion dollar market. The fraudulent concealment doctrine can extend the claimed damage period to ten or twenty years. Class actions multiply the damage claims still more, and lenient rules regarding pleading and proof of conspiracies make a finding of liability for "more damages than anyone can pay" a real possibility. See New Approaches to Antitrust Damages: The Alternatives to Mandatory Trebling (Judge Griffin Bell) 39 Business Lawyer 1089, 1094 (May 1984).

2. The current system of antitrust remedies has been described as "a very attractive hunting ground for people who want a settlement involving large amounts of money, even though no real violation of the antitrust laws has occurred." New Approaches to Antitrust Damages, supra at 1092 (William Breit).

3. See e.g., Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (where plaintiff sued only one of four alleged participants in a conspiracy to fix the price of ready-mix concrete, defendant held responsible for all of the treble damages caused by the alleged conspiracy); Olsan Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979) (plaintiff sued only one of five alleged price fixers for damages and held that individual company, with only 11.8% of the relevant market, liable for all of the treble damages caused by the alleged conspiracy).

4. S.1300 appears to apply only to horizontal restraints of trade in which the plaintiff or plaintiff class seeks to recover an overcharge resulting from a conspiracy among sellers or an undercharge resulting from a conspiracy among buyers. There are many situations in which the apportionment of liability would be equally desirable, but which appear to fall outside the scope of S.1300. See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (addressing whether a right of contribution should exist in an action alleging a vertical conspiracy between a manufacturer and its distributor); Hydrolevel Corp. v. Am. Soc'y of Mech. Engineers, 635 F.2d 118 (2d Cir. 1980), aff'd, 456 U.S. 556 (1982) (holding that an innocent ASME could be held liable for the tortious conduct of two of the plaintiff's competitors acting under the auspices of ASME, even though plaintiff had settled with the two guilty parties). By endorsing S.1300, I do not suggest that the apportionment of liability in some of these other types of antitrust cases should be ignored. I urge the Congress to reconsider the question of contribution, irrespective of what action is taken on these two bills.

In the event, however, that Congress is reluctant significantly to limit joint and several liability in private antitrust litigation, it may still be possible to accommodate both the need to address the abuse inherent in the current system and the desire to preserve that concept. One possible approach would be to preserve joint and several liability with respect to the sales or purchases of all _joined_ defendants. Such an approach would wed the best of S. 1300 and S. 2162. Under such an approach, joined defendants would remain joint and severally liable as among each other, but would not be liable for injuries caused by non-joined defendants. One means to accomplish this is to conclusively presume that non-joined putative co-conspirators have settled with the plaintiff, and apply S. 2162's rules of claim reduction to those defendants. This would be true only if the putative non-named co-conspirator could, as a practical matter, have been joined. Note that, as is true today, the plaintiff or plaintiffs can still recover all of their damages under this proposal. They can either join all defendants in one action or, if easier, join different defendants in different actions.

This suggested alternative would have the advantage of encouraging a plaintiff to join all alleged wrongdoers as defendants -- an incentive which is sacrificed in the Administration's "pure" claim reduction approach. The concept of joint and several liability would also be preserved and, to the extent that such liability helps to deter anticompetitive behavior, the deterrence factor would remain intact. Such a compromise would be particularly appropriate in the type of horizontal price affecting cases covered by S. 1300, where a plaintiff may more readily be able to identify the members of the alleged conspiracy which injured him. I also would support the extension of this concept to all private antitrust actions if appropriate guidelines for determining apportionment of liability could be formulated, as is attempted in the reduction approaches would alleviate the problem of settlement abuse, they would not adequately redress the inequities in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged co-conspirators.10/ In contrast, S. 1300 eliminates the potential for joint and several liability abuse in both the settlement and litigation process, because each company's potential treble damage liability could not exceed the individual consequences of its own actions. Thus, a plaintiff would be encouraged to join as defendants all those who have assertedly caused it harm in order to recover its full treble damages.

Additionally, the Administration's claim reduction bill is applicable to all private damage actions, while S. 1300 is limited to cases challenging agreements among competitors in which the damages awarded are based upon impact on price. Price-affecting horizontal conspiracies are typically the type of multidefendant, industry-wide liability cases in which the greatest abuses of the joint and several liability doctrine have occurred, and are the type of cases in which it is most appropriate to determine the individual share of damages attributable to each defendant according to its purchases or sales.

Thus, of the two approaches -- claim reduction and individual treble damage liability -- the latter may be the most efficient and appropriate solution to the problems inherent in current rules of joint antitrust liability. Claim reduction, as exemplified by the Administration's bill, alleviates the problem of settlement abuse, but does not address the potential for joint and several liability abuse in the litigation process which is targeted by S. 1300, and could also create strategic incentives for plaintiffs not to join all defendants.

Accordingly, I prefer the individual treble damage liability approach of S. 1300 to the Administration's claim reduction bill, but would endorse the latter if a bill such as S. 1300 fails to gain sufficient support in Congress.

Opponents of S.1300 argue that the elimination of joint and several liability may undermine the deterrent effect often attributed to private treble damage litigation in preventing violations of the antitrust laws. The primary deterrent in the present system of antitrust remedies is the trebling of actual damages. Any additional deterrence resulting from joint and several liability necessarily must flow from the injection of randomness into the remedies system. There is, however, no support for the notion that deterrence is enhanced by giving to a plaintiff the option of imposing upon one defendant all of the liability attributable to many. To the contrary, one can argue that deterrence will be enhanced by a rule which is more likely to impose some liability on each defendant over a rule which whimsically could place all of the liability upon one defendant and thereby create a windfall to other guilty co-conspirators, whether joined or not.7/ Justice Brennan, for example, while a member of the New Jersey Supreme Court, made the following observation:

> "If each intentional wrongdoer knew that his conduct was exposing him to the risk of certainty of liability in some amount, the desired deterrent effect would be produced more surely than if [apportionment of liability] among wrongdoers is denied" (Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 88, 110 A.2d 24, 34 (1954)).

Of course, the other side of the argument is that the possibility of a larger judgment, even though less certain, acts as a greater deterrent.8/ The reality is that neither argument is empirically supportable, and thus neither can properly form the basis for injecting the concept of "deterrence" into the policy considerations involved in the apportionment of damages.9/

While both the claim reduction rule embodied in the Administration's bill and the individual treble damage liability concept of S.1300 have been developed in response to the need to redress abuses in the existing system of antitrust remedies, the two approaches differ both in operation and effect. Although the Administration's and other claim alleging acts affecting price would be subject only to treble the damages attributable to its sales or purchases of goods or services in the affected industry. Thus, the legislation would eliminate joint and several liability only in cases challenging agreements among competitors in which the damages awarded are based on impact on price. Liability would be apportioned on the basis of the overcharges or undercharges attributable to a particular defendant's sales or purchases.

Proponents of S. 1300 believe that this approach to damage allocation would bring about a more desirable balance than now exists between the parties in conspiracy litigation brought to recover overcharges or undercharges.4/ By making each defendant liable only for the injuries attributable to that defendant, the size of a defendant's potential liability will in most cases bear a logical and natural relationship to the size of the company in relation to the affected market, and potential liability for injury caused by others will no longer operate to coerce unfair settlements.

Theoretically, the abolition of joint and several liability within the scheme of S.1300 should not work undue hardship on plaintiffs, since the aggregate damage award, as such, will not be affected. The principal justification for requiring each defendant to be jointly and severally liable for injuries caused by other defendants is to insure that the plaintiff or plaintiff class is fully compensated for its loss.5/ As a practical matter, this concern is of little consequence in most horizontal price fixing litigation because defendants tend to be companies of substantial size from which judgments can readily be collected. Of course, S. 1300 would force an antitrust plaintiff to sue each and every defendant responsible for its loss in order to make a full recovery. As for the rare case in which an antitrust defendant could not satisfy a judgment or is unreachable, S.1300 accommodates the plaintiff by continuing to impose liability on the other defendants with respect to that portion of the plaintiff's damages attributable to the acts of the insolvent or unreachable defendant.6/

redress an unfairness inherent in the existing system of antitrust remedies law. Under the principle of joint and several liability, an antitrust defendant is liable for treble the damages caused not only by its own acts but also for treble the damages attributable to the acts of all other alleged co-conspirators. There is no right of contribution among alleged co-conspirators. In the context of liberal antitrust damage standards and multidistrict class actions, potential treble damage exposure in a antitrust suit can be staggering.1/

The current potential for open-ended liability may well drive innocent companies toward settlement once some other defendants have settled, probably for less than their fair share. As more defendants settle, the pressure on the remaining defendants increases, and a plaintiff will generally seek to settle with them at disproportionately higher amounts than the earlier settlements. Such "whipsawing" is undesirable from the standpoint of antitrust policy, since it renders irrelevant the guilt or innocence of the defendants as well as the amount of damage actually caused by a particular party.2/

Apart from the potential for abusive settlement tactics, the combination of treble damages and joint and several liability can also lead to other unfair results in the allocation of antitrust liability. Since a plaintiff is free to collect all of its treble damages from any one of a group of conspirators, liability may be apportioned according to the whims of a plaintiff rather than in accordance with any concept of culpability. In some instances, the companies with the greatest market shares, who arguably would have benefited the most from an alleged conspiracy, may pay less than their fair share of damages or nothing at all, while companies with much smaller market positions may be forced to satisfy a judgment for most of an industry's liability.3/

S. 1300, a bill introduced in June 1985 by Chairman Thurmond as an alternative to contribution legislation, provides that an antitrust law violator in horizontal cases

STATEMENT OF JAMES T. HALVERSON
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
REGARDING S. 2162 AND S. 1300

APRIL 15, 1986

Mr. Chairman and members of the Committee, my name is James T. Halverson, and I am a partner at the New York law firm of Shearman & Sterling. I am appearing today in my individual capacity, and not in my capacity as Chairman of the Section of Antitrust Law of the American Bar Association. Thus, my remarks have not been approved by the Board of Governors or the House of Delegates of the ABA, and they should not in any way be construed to represent the views of the ABA or any of its entities.

On September 17, 1985, fourteen former Chairmen of the Section of Antitrust Law and I submitted a report to this committee in support of S. 1300. Those views were also submitted by us in our individual capacities. Since that report was submitted, the Administration has proposed a bill, S. 2162, dealing with reform of antitrust remedies, including proposals to address the claim reduction problem. I would like to comment today on my views with respect to the merits of both S. 1300 and Title IV of S. 2162.

Title IV of S. 2162, the Administration's proposed "Antitrust Remedies Improvement Act of 1986," would establish new rules for reducing the claim of an antitrust plaintiff which has settled with and released a defendant or potential defendant from liability. Under the approach set forth in the bill, which would amend Section 4 of the Clayton Act, the damage claim of an antitrust plaintiff which has settled with and released a defendant or potential defendant from liability would be reduced by at least the proportionate share of that claim fairly allocable to the settling defendant. The non-settling defendants would remain jointly and severally liable for the remainder of the plaintiff's damages. The claim reduction rule would apply to all private antitrust actions.

As in the case of S. 1300, the Administration's proposal was developed in response to the perceived need to

The CHAIRMAN. Excuse me, Senator Metzenbaum. Would you mind winding up this hearing? I have an engagement at the Capitol at 12 o'clock, and I have got to go.

Senator METZENBAUM. Yes. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you gentlemen, again, for your appearance.

Senator METZENBAUM. Mr. Constantine?

Mr. CONSTANTINE. Again, only for New York State, Senator, the State would be able to bring a class action on behalf of the entities that it represents in State court.

Senator METZENBAUM. How about a class action?

Mr. CONSTANTINE. But a private plaintiff class action is not available under the New York State antitrust law because treble damages are deemed to be punitive in nature, and the New York law bars class actions for punitive damages.

Senator METZENBAUM. Do any of the other States permit it? I had asked this question about joint and several liability in most State law tort cases.

Go ahead, Mr. Halverson.

Mr. HALVERSON. Yes, I can answer your question directly. Thirty-nine States and the District of Columbia now permit some form of contribution among joint tortfeasors. Thirty-six States have established contribution by statute. In five States and the District of Columbia, contribution has been judicially authorized. And that is the difference. Joint and several liability without right of contribution is the real problem here. In the State situation, 39 States have the right of contribution. I am citing from——

Senator METZENBAUM. Now, you are talking about what kind of cases?

Mr. HALVERSON. In joint tortfeasor cases, such as antitrust cases. I am citing from a monograph published by the American Bar Association Section of Antitrust Law, monograph 11, entitled, "Contribution and Claim Reduction in Antitrust Litigation."

[The following was subsequently supplied for the record:]

No. 2, it is being done when there is no basis in fact to have this type of legislation enacted, for the reasons I have stated earlier today.

Thank you.

The Chairman. Mr. Constantine?

Mr. Constantine. The one reason, Mr. Chairman, is that the concept of equity and fairness among price fixers and big riggers is clearly inapposite, and either of these bills would inhibit the ability of New York State, one small State, and the other 49 small States, to recover their full damages in a price fixing, bid rigging, or market allocation case.

Thank you, Mr. Chairman.

The Chairman. Thank you, gentlemen.

Now, Sentor Metzenbaum, we are very pleased to have you here, and if you have any statement to put in the record or any questions, feel free to proceed.

Senator Metzenbaum. Thank you very much. I will not be able to stay long, Mr. Chairman.

The Chairman. Well, we are through now, except for what you have.

Senator Metzenbaum. Isn't it true that in most State law tort cases, there is joint and several liability among joint tortfeasors? Any one of you could answer that.

Mr. Constantine. I can answer for New York State, Senator, and that is that there certainly is joint and several liability under the New York antitrust law, the Donnelly Act. And one of the unintended results of passing either of these pieces of legislation would probably be to simply channel cases into the already overloaded State court system, which are probably not well-geared-up to take care of these complex cases.

Senator Metzenbaum. So are you saying, Mr. Constantine, that if we were to pass S. 1300, that any corporation doing business in New York State could get jurisdiction of the mayor and bring the action in New York State?

Mr. Constantine. That is precisely right. I have several draft complaints on my desk right now, and if this bill were to pass today, tomorrow, I would file those cases in New York Supreme Court instead of the U.S. district court. And I would assume that would be true of private litigants as well. I do not think that the defendants, perhaps from remote jurisdictions, would like to litigate their cases in New York Supreme Court for a variety of reasons, but that might be one of the unintended effects of this legislation.

Senator Metzenbaum. Mr. Wiseman, on behalf of the chamber, do you want to respond to that? This is an aspect of it that I had never thought about.

Mr. Wiseman. Well, I believe there is a significant difference in State cases—namely, under rule 23 of the Federal Rules of Civil Procedure, you can have a national class action brought by a single plaintiff against a single defendant or all defendants, seeking damages based upon the entire industry wide sales. I am not sure that such an action could be brought in State court. So there really is not necessarily an analogy there.

until proven guilty. In many of these cases, the companies were innocent. There had been grand jury investigations and no indictments. But they could not take the chance of going to trial in the civil case, because a billion-dollar damage judgment was their exposure.

Senator METZENBAUM. Well, there is also is a different standard of proof in both these cases, isn't there, Mr. Wiseman?

Mr. WISEMAN. Of course there is, Senator. But if you have your choice—if I think I am innocent, but I have a billion-dollar exposure, I cannot take that risk. And it is fundamentally unfair, therefore, for you to be denied access to the courts.

The CHAIRMAN. Mr. Halverson?

Mr. HALVERSON. Yes, Mr. Chairman. I would say I just gave you an example in Philadelphia of exactly what the abuse could be. That is that in a situation where, prior to the filing of a complaint, the plaintiff's counsel sends the chief executive officers of certain companies whose size or shre of the market in relationship to the total market affected may be big or small, but they are given an opportunity to take a sweetheart settlement, what I call a sweetheart settlement, because it is a settlement lower than those who stay in the case—lower per percentage point of the relevant market.

It was done in this situation. It helps fund the litigation for the plaintiff's counsel. It serves no public service, and it misallocates, completely misallocates, real damages among the defendants to the extent there are any guilty defendants. And it creates an incentive for the remaining defendants to settle because they cannot afford to take on the liability for those nonnamed settling defendants.

It is a very, very, very vicious thing, and it has no relationship to culpability, and it has no relationship to the size, market share size, of the defendant, in relation to the market alleged.

Senator METZENBAUM. Mr. Halverson, I came late. Would you be good enough to clarify this for me? As I understand it, you are not speaking on behalf of the Antitrust Division of the American Bar Association. Is that correct?

Mr. HALVERSON. That is correct; just myself.

Senator METZENBAUM. You are just speaking on behalf of yourself, is that right?

Mr. HALVERSON. And 20 years of trying antitrust cases.

The CHAIRMAN. He pointed that out earlier.

Senator METZENBAUM. Yes, I understood that, but I was not here, and I just wanted to satisfy myself.

I think you wanted to ask the other two men why, in one sentence, they were against the bill.

The CHAIRMAN. Well, I was asking these for one reason why they were for it. Now I would like to ask those who are opposed to it the one reason why you are against it.

Mr. Montague?

Mr. MONTAGUE. I have one reason, but it has two parts, Senator. One is that the bill will have a negative impact and will emasculate the private enforcement of the antitrust laws, which I feel is very important to this country.

I believe also that the representative of the association who testified before the Judiciary Committee last fall, Michael Brockmeyer of Maryland, testified that this was a typical modus operandi in the State of Maryland.

When S. 1300 was originally drafted, one of its drafters, Mr. Ira Millstein of the firm of Weil Gotschal appeared before the Association of the Bar of the City of New York and admitted that S. 1300 did not deal with the situation of a conspirator who did not have sales.

The CHAIRMAN. Senator Specter has some questions that you gentlemen can answer for the record, so we will turn those over to you.

Now I would like to ask you three who favor S. 1300 to give me your main reason why you favor it, without going into detail: if you could just give one reason, what would you say is that reason?

Mr. SOUTENDIJK. To make it possible for a defendant who is small to have its fair hearing in court; to make it possible for some company sued who is innocent and wants to be heard in court, wants to prove its innocence, to make it possible for that company to do that without in effect risking its entire net worth.

The CHAIRMAN. Without being forced to settle.

Mr. SOUTENDIJK. That is correct.

Senator METZENBAUM. I gather from that, Mr. Soutendijk, that you are here just because you are worried about one company. He asked you one reason for it, and you want to be sure that one small company would be able to have its day in court. And yet, you are general counsel and secretary of one of the largest companies of America. I do not quite follow that reasoning.

Is Union Camp that small?

Mr. SOUTENDIJK. Union Camp, Senator Metzenbaum, is a large corporation. But in almost all of the markets in which it participates, it is a relatively small part of that market. For example, the corrugated container industry in this country is an enormous industry, and Union Camp is just 2, 3, 4 percent.

Senator METZENBAUM. But then you are saying for a company that has a small share of the market, not for a small company, because your answer related to the size of the company and not to the size of the market.

Mr. SOUTENDIJK. I am referring primarily to a company which has a small share of the market. That is quite often, Senator, also a small company.

Of course, in very large industries, that is not necessarily the case.

Senator METZENBAUM. Sometimes small, sometimes large.

The CHAIRMAN. Mr. Wiseman?

Mr. WISEMAN. I would concur with what has just been said. It is fundamentally unfair for a company with a 1-percent market share to be exposed to damages based upon 100 percent of industry sales. It makes it virtually impossible for such a company to go to trial if he thinks he is innocent. And he is effectively denied his access to the courts. He just cannot take the risk of betting his company if he is wrong.

And I might add that in the typical antitrust case, it is not a hardcore case. We forget that a company is presumed innocent

In your view, should S. 1300 be amended to provide for some liability for a participant in a conspiracy who has not made sales as that term is used in the bill?

Mr. Soutendijk?

Mr. SOUTENDIJK. S. 1300 in my view should not be so amended, Mr. Chairman. A participant in a conspiracy who has not made sales would be covered under S. 1300. In the discretion of the court, his damages would be based on sales or on benefit received, or on some other measure, and I think would be appropriately dealt with under the present S. 1300.

The CHAIRMAN. Mr. Wiseman?

Mr. WISEMAN. I think, Mr. Chairman, that in the typical case like a bid-rigging case, if there were a conspiracy, each conspirator would have had sales to somebody, and therefore, would be liable in any event. It would be a rare conspiracy where two companies got together, and one company was the only one that was in effect going to benefit from it. And the likely thing that would happen is you might have two or three targets of the conspiracy, and each person is allocated his share of the sales, and so each would be in effect liable.

So I think it would be unnecessary for that additional reason to modify S. 1300.

The CHAIRMAN. Mr. Halverson?

Mr. HALVERSON. I think I agree with the previous statement. I think in most antitrust litigation involving an alleged conspiracy, if the conspiracy is proved and the participants are proved to be parts of the conspiracy, they will have had sales. So I do not see any benefit of the exclusion.

The CHAIRMAN. Mr. Montague?

Mr. MONTAGUE. Reserving my opposition to S. 1300, Senator, I would agree with you that if it were to pass, it clearly requires such an amendment. And I can give you one example of an actual case, where the conspirators were selling water heaters, and one of the suppliers of parts to the water heater was the focal point of the conspiracy; he was the one who put the germ of price fixing into his customers' heads, and two, he and his company were the modus operandi for fixing the prices. It was through this particular supplier that the sellers of water heaters met and so forth. Yet that particular company had no sales of water heaters. Clearly, that person and his company should be liable under the antitrust laws.

The other example, of course, is trade associations. It is very often that price-fixing violations occur through the auspices of a trade association.

The CHAIRMAN. Mr. Constantine?

Mr. CONSTANTINE. Again, preserving the association's opposition to S. 1300, certainly, if it passed it should be amended in the way that you have observed.

It is a very typical situation that we confront in New York, dealing with bid-rigging and market allocation on highway and electrical contracting that one or two or three companies get all the sales in a market, and other companies that could bid, but are conspiring, get their payments in the form of a subcontract or some other in-kind payment.

The CHAIRMAN. In other words, you are pleased with the present law, and you favor no changes?

Mr. MONTAGUE. That is correct.

The CHAIRMAN. Now, Mr. Constantine.

Mr. CONSTANTINE. Thank you, Mr. Chairman.

The other four gentlemen seated at the table represent defendants and plaintiffs in private litigation. I come to you as a representative of the 50 State attorneys general in the United States, Republicans and Democrats, who are unanimously opposed to S. 1300, and in 1982 were nearly unanimously opposed to a previous claims reduction provision.

You asked about the concept of joint and several liability and the pros and cons. What I have heard today from the defendants 'side is that the problem here is the whipsaw settlement of an innocent defendant, faced with huge liability.

I would like to point out, Mr. Chairman, that this presupposes that in the very, very rare antitrust case that actually goes to trial, and in the very, very rare case that goes to trial which winds up with a judgment for the plaintiff, that there is going to be a miscarriage of justice.

This entire argument is based upon the assumption that an innocent defendant in that very, very rare case will be unjustly held liable and have to pay treble damages for an entire industry.

The second thing that I have heard from the defendants' side today is that this is just so unfair to the defendants. I ask you, Mr. Chairman, why is the concept of fairness applicable in this context. Fairness among price-fixers, among bid-riggers, among those companies that allocate markets, and steal money from State and Federal Governments, let alone private litigants—what is the applicability of fairness among these conspirators?

It is only fair that each and every conspirator and co-conspirator will be liable for the full weight of the entire conspiracy.

The concept of fairness and individual responsibility in a conspiracy is just inapposite. The law of conspiracy has always been that a conspirator is not only liable for what it does, but what all its co-conspirators do as well.

Thank you, Mr. Chairman.

The CHAIRMAN. As I construe your position, then, you do not favor any change in present law?

Mr. CONSTANTINE. The position of the National Association is that we oppose S. 1300. The previous position was that we opposed claims reduction. I would say, Mr. Chairman, however, that the administration's proposal is a lesser evil than S. 1300, because S. 1300 not only destroys joint and several liability but S. 1300, as I pointed out before, would releive liability, complete liability, from certain co-conspirators who have no sales and have no percentage of the market, those conspirators who get their conspiratorial gain in the way of some payment in-kind or a subcontract.

So S. 2162 represents a bad initiative, but a lesser evil to S. 1300.

The CHAIRMAN. I would like to ask you this question. In your view, should S. 1300 be amended to provide for some liability for a participant in a conspiracy who has not made sales as that is used in the bill?

Did you catch the question? I will repeat it.

Mr. Constantine. Mr. Chairman, might I respond to your question?

The Chairman. Yes; I am going to come to you in just a minute. Did you start to say something, Mr. Halverson?

Mr. Halverson. Yes; I would say that my proposal for modification is slightly different from what Mr. Ginsburg proposed, but I would accept Mr. Ginsburg's proposal.

The Chairman. Now, Mr. Montague?

Mr. Montague. Yes; I would like to make a few remarks, if I may, in response to your question.

I am pro joint and several liability, one as it allows for a complete recovery. But I think Mr. Wiseman put his hand right on the pulse when he said in the real world, when it comes to negotiating, the plaintiffs only negotiate when they have some strength, and if they do not have a lot of strength, then there is an agreement, as Mr. Wiseman pointed out, where the sales of the settling defendants are in fact taken out of the case and you have a negotiated claims reduction.

Where the plaintiffs have a strong case, they have more negotiating power, and they are able to negotiate keeping the sales in. But that is a function of the marketplace, and that is a function of how the parties assess the case as they see it. And that should never be taken away from this kind of litigation if we are going to get fair and reasonable results.

There is a lot of talk about sweetheart settlements, and I respectfully submit, particularly in the class action field, that every single settlement that is made must get court approval. Notice goes to all members of the class. There are all kinds of people who come in and object of they do not feel it is sufficient. The district court gives it a very careful lookover. There are no sweetheart settlements; there cannot be sweetheart settlements under the way rule 23 operates. So I think that that kind of hyperbole does not belong in the consideration of this legislation.

Lastly is the deterrence aspect. The deterrence aspect is important, because if the poor little company with one percent of the market knows that it is going to be faced with a possibility of substantial liability, maybe that company will not join in the conspiracy. Maybe that company instead will go to the Department of Justice and reveal what is going on in the industry.

Thank you.

The Chairman. Now, as I understand it, you oppose S. 1300.

Mr. Montague. I do.

The Chairman. Are you as strongly opposed to the Justice Department position?

Mr. Montague. Yes.

The Chairman. You are strongly opposed to both.

Mr. Montague. I am opposed to both because I think both of them are—well, there is an old expression, as I am sure you know, Senator, "If it ain't broke, don't fix it." And I really think that there are no abuses and the problems that have been so emotionally alleged to have arisen, and if someone would look at the empirical evidence, they would see that there are not those kinds of abuses.

called sweetheart settlements. Those are settlements for less than their fair share.

As you know, under present rules, there is no credit against the treble damage amount given for those settlements, but credit will be given at the end if there is a treble damage award, only for the amount of the settlement after the trebling.

What happens here is an encouragement to the plaintiffs to do selective suing, that is, to sue only certain defendants and settle with others; and even, in my opinion, not to sue, as in the case in Philadelphia, certain potential defendants, where they feel that they may cause them more trouble in the defense of the suit.

So what you have is the possibility of the defendants who are finally sued being responsible for those defendants who have settled earlier, with no right of contribution, and only a very limited right of set-off, and responsibility at the same time for non-named defendants who have not settled. That is just clearly inequitable, and it leaves it in the hands of the plaintiff's counsel to determine who pays what and who gets a sweetheart settlement.

The S. 1300 rule of individual responsibility would take care of that in horizontal price-affecting cases, because it would eliminate joint and several liability, in that situation, where treble damages are still available, and the plaintiffs can sue everyone. Or if they cannot sue everyone, because one individual defendant is not reachable, then his share of the damages goes into the pot to be assessed against the defendants that can be sued. That is the fair situation. That is the one where all defendants can be sued, and the plaintiffs have a right to recover all their damages—fairly allocable, based on individual responsibility.

The Chairman. As I understand it, all three of you gentlemen who have just spoken favor S. 1300; is that true?

Mr. Halverson. That is true.

Mr. Wiseman. Yes.

Mr. Soutendijk. Yes.

The Chairman. But if you do not get S. 1300, you would favor the Justice Department's bill—as modified.

Mr. Halverson. In my statement, I proposed a modification which would be acceptable to me, Mr. Chairman.

The Chairman. I see.

Mr. Wiseman. Mr. Chairman, the proposal made by the Antitrust Division today would cure the most egregious problems that have existed in the past. It does not cure the whole problem, but we are practical people, and it is a simple, effective way to deal with the problem.

The problem it does not cure is if five companies went to trial, in theory, a plaintiff might go after one of those companies for an adverse judgment, but in terms of the settlement context and the dangers if everyone is not sued, the Justice Department's compromise proposal goes a long way, and it could be supported.

The Chairman. In other words, you feel the Justice Department proposal is not as perfect as S. 1300, but you would consider going along with it; is that it—rather than not get anything?

Mr. Soutendijk. That is the position of the coalition of 25 companies, yes, Mr. Chairman.

Mr. Wiseman. And the chamber.

Mr. Soutendijk.

Mr. Soutendijk. It is the position, Mr. Chairman, of the coalition, that joint and several liability has a limited applicability in antitrust remedies. It is wholly appropriate to have the concept where necessary to make a plaintiff whole. If a plaintiff goes to trial, proves its case, and is damaged, then that plaintiff ought to be compensated. And if some defendants cannot be brought before the court, or if some defendants are unable to satisfy their fair share of the damages caused, then I think it is wholly appropriate that the other defendants provide that full compensation. To that extent, joint and several liability is a good thing to have.

The coalition, however, does not feel it is appropriate for a small defendant, a defendant with a small market share, to be potentially faced with a ruinous result—often, such an enormous potential for damages that that small defendant cannot have its day in court.

Our system of justice presumes innocence. Some defendants are guilty; but some are not. And before there has been a trial and a jury verdict, I think it is unfair that a small defendant be placed in a position where he might be liable for such a horrendous judgment that he cannot have his day in court.

To that extent the coalition believes that joint and several liability has no place in antitrust law.

The Chairman. Mr. Wiseman.

Mr. Wiseman. If I may add, Mr. Chairman, in the real world of litigation, a modification of joint and several liability as is proposed in S. 1300 will not in fact restrict the ability of plaintiffs to recover their damages.

This problem of the whipsaw settlement is of recent origin. I was in a national class action, the first one that went to trial, in 1973. Nine defendants were named. Three settled. The three who settled said to the plaintiffs: "If we settle, we want our sales out of the case, so that the nonsettlers will not be liable for damages based on our sales."

The plaintiffs said, "Fine."

The case went to trial; it was a hung jury, and it was later settled. It did not restrict the ability of the plaintiffs to settle with those defendants that they chose to settle with.

The proposal will say your universe of damages stay the same; the only thing that is changed is that you cannot give a sweetheart deal to a culpable defendant and extract what amounts to extortion from a small defendant who may well be innocent, but who cannot let his company go to trial.

The Chairman. Mr. Halverson?

Mr. Halverson. Yes, Mr. Chairman, I would like to agree with that.

I, as a matter of fact, have an antitrust treble damage action involving a multi-defendant situation, not a class action, in Philadelphia right now. In that situation, the plaintiff's attorney served courtesy copies of a proposed complaint on the chief executive officers of some 15 to 16 companies before ever filing the complaint. Five companies, because of the fear of joint and several liability and the treble damage combination, settled out in advance with so-are some inequities in joint and several liability. But I do not want to make it impossibly expensive for somebody to sue.

Now, what are the sensible answers? Frankly, I do not see either one of these bills providing sensible answers.

Would it make sense, for example, instead of treble damages, to make it 5 times or 10 times, but not to exceed 100 percent? So that at 10 times, if you have 1 percent liability, you would be subject to 10 percent of the whole.

Congressman Rodino has suggested we make it easier for the alleged conspirators to sue one another. So that if you are only liable for 2 percent, and have been stuck with 100 percent of liability, you can more easily sue the others responsible.

I guess some of us want to see antitrust laws enforced vigorously; we want to keep an instrument. We recognize there is some unfairness in the present law, but we are looking for something other than the alternatives we have right now. I would be interested in your suggestions.

I thank you, Mr. Chairman, for letting me get ahead of my chairman, who has appreciably more seniority than this freshman Member from Illinois.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Soutendijk, would you, Mr. Wiseman, and Mr. Halverson, like to respond to that, and the others, if they wish.

Senator SIMON. They could respond in writing to me, Mr. Chairman, because unfortunately, I have to get along to another meeting right now.

Mr. HALVERSON. I will be happy to respond in writing, Mr. Chairman.

The CHAIRMAN. Would you gentlemen then respond in writing, and send me a copy of that response, so we can have it.

Senator SIMON. If you would send a copy to me and one copy to the committee, so we can place it in the files.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Mr. HALVERSON. Mr. Chairman, I neglected to ask that my full statement be placed in the record. I hope it will.

The CHAIRMAN. Without objection, we will put all of your statements in the record in their entirety.

Mr. MONTAGUE. Mr. Chairman, I did not have an opportunity, having been contacted yesterday, to prepare a statement.

Would it be appropriate to prepare one and submit it for the record?

The CHAIRMAN. Yes; it would—I would not make it too long.

Mr. MONTAGUE. Thank you.

The CHAIRMAN. The Senators are so busy—if you come right to the point and make it as brief as you can to bring out your points.

Now, I have a few questions here, and you can all express yourselves on them.

The first is, the administration favors the retention of joint and several liability. Would you summarize what you believe are the pros and cons of preserving joint and several liability for antitrust violations?

We will start with you three gentlemen and then go to the other two.

does something else. It does away with all liability for certain antitrust coconspirators.

For example, Mr. Chairman—and this is a problem we see over and over again in cases that are prosecuted by the State, on highway bid-rigging cases, and cases involving conspiracies involving electrical contracting—some of the coconspirators in a price-fixing or market allocation conspiracy do not actually have sales. They get their payment for the conspiracy in the form of subcontracts or payments in kind.

Under S. 1300, they have made no sales, they have no percentage of the market; therefore, they do not have any liability whatsoever. That is why S. 1300 not only obliterates joint and several liability, but it goes on to do other things.

The second way of doing away with joint and several liability involves the concept of contribution. It is somewhat better than S. 1300. It does the same thing to joint and several liability. The only problem that after liability has been meted out, the coconspirators sue each other for equity among themselves, and this gets the courts involved in meting out equity to conspirators.

That brings us to S. 2162, which is the claims reduction provision. It does not do away with the dynamic of giving a defendant an incentive to getting in early, settling cheaply, and selling out its coconspirators, but it does do away with the incentive of the Government to allow that to happen, because the Government has no incentive to allow that because its damage is reduced by the amount of that settlement.

I am not surprised, Mr. Chairman, by what I have heard from the representatives of defendants here. I would expect them to argue before this Congress to do anything possible to reduce the weight of joint and several liability and to get out from under this burden of the antitrust laws.

I am surprised to hear what the representative of the Justice Department has said here. I can see no principled basis for a government representative coming before the Congress and arguing to this Congress for a rule which would limit the ability of the Federal Government, and for the ability of State governments, to recover the full amount of their damages. And that is precisely what would happen here. The ability of my office, the ability of the Justice Department, the ability of Government prosecutors who have been victimized in price-fixing, bid-rigging, and market-allocation cases would be limited. We would not be able to recover our full damages, let alone trebled, our full damages, if any of these three concepts were enacted by Congress.

Thank you, Mr. Chairman. I would be glad to answer any questions you might have.

The CHAIRMAN. Thank you.

I have a few questions, and then I am going to call on the distinguished Senator from Illinois.

Did you wish to make a statement, Senator Simon?

Senator SIMON. If I could just pose a few questions—unfortunately, I have to move along, and I do not expect them to be answered right now—but if the witnesses could answer them in writing.

Here is my problem. I see an administration that is basically pretty anemic in its enforcement of antitrust law. I recognize there

The CHAIRMAN. Mr. Constantine?

STATEMENT OF HON. LLOYD CONSTANTINE

Mr. CONSTANTINE. Thank you, Mr. Chairman.

My name is Lloyd Constantine. I am the assistant attorney general in charge of antitrust enforcement for New York State, in the office of Attorney General Robert Abrams.

I am here today on behalf of the National Association of Attorneys General who, in December 1985, in Biloxi, MS, resolved unanimously to oppose S. 1300, and previously, in 1982, resolved to oppose a claims reduction provision that was before the Congress at that time.

Section 4(I)(c) of S. 2162 says that "Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws."

But of course, Mr. Chairman, that is exactly what this is all about. This is doing away with the concept of joint and several liability and the full weight of joint and several liability.

I do not think anybody except for Mr. Montague has actually addressed what exactly joint and several liability is. Joint and several liability is a rule that all conspirators will be fully responsible for each other's acts. That is all it is. The idea of individual responsibility has no place here, it has no validity, it has no justification, except to erect rules of fairness to criminals. And that is what we are talking about here, Mr. Chairman, because this rule, the rule of joint and several liability, has its clearest application in horizontal price-fixing cases, bid-rigging cases, and market allocation cases—hard-core criminal antitrust violations.

By reducing the full weight of joint and several liability, you allow conspirators to maintain the discipline of their conspiracy after their conspiracy has been detected by the Government or after a private attorney general has sued them.

In short, it promotes honor among thieves.

There are three dynamics which are involved in the concept of joint and several liability. There are three incentives that are going on. First, the Government has an incentive to release a defendant early for a modest amount for testimony against its coconspirators. The second dynamic is that a defendant has the incentive to get in early, settle cheaply, and sell out his coconspirators.

The third dynamic is that the remaining defendants are left holding the bag for the full damage or the full weight of the conspiracy.

Now, there are three ways of going about doing away with joint and several liability, three ways of reducing the full weight of that dynamic, and they have been before the Congress and before the courts.

One is contribution. The second is individual treble damage responsibility as represented in S. 1300. The third is represented by S. 2162, which is claims reduction.

The worst by far is exemplified in S. 1300, which is so-called individual treble damage responsibility. It completely obliterates the concept of joint and several liability, but it goes beyond that, and it

Honorable Strom Thurmond
April 22, 1986
Page Three

D. Allowing even the possibility of an award of attorneys' fees to successful defendants will act as a disincentive to the vigorous private enforcement of the federal antitrust laws.

Title III provides this disincentive to plaintiffs by the threat that if plaintiff loses, plaintiff will be faced with a claim for attorneys' fees - a claim which includes two parts: (a) whether the defendant is entitled to attorneys' fees; and (b) if so, how much. As the commentary in support to Title III candidly admits:

> ...The determination of whether a plaintiff's conduct has been "unreasonable" must be based upon an evaluation of the factual and legal merits of the case. Conduct may be judged to be unreasonable even though it might not be considered frivolous, without foundation or in bad faith.

Thus, proponents of Title III admit that in effect, Title III creates a *new* cause of action (and new litigation) for attorneys' fees *after* the conclusion of the initial antitrust claim. Because almost every antitrust claim presents substantial risks to plaintiffs, Title III adds to those risks and as a result will discourage virtually *all* private antitrust enforcement.

The attorneys' fees provisions of sections 4 and 16 of the Clayton Act were enacted to *encourage* private enforcement of the antitrust laws. To now insert Title III into those sections is to counter the foregoing incentive with a strong chilling effect. This appears to be an indirect method of emasculating the antitrust laws. If that is what the proponents of Title III wish to do, they should do it directly so that your Committee can confront that philosophy.

Thank you for the opportunity to respond.

With expressions of my highest esteem,

Sincerely,

H. Laddie Montague, Jr.

HLM,Jr./mrr

B. In antitrust cases, particularly "conspiracy" cases, the evidence is usually exclusively in the possession of the defendants. Thus, sometimes a plaintiff cannot discover the existence of evidence that he had reason to believe existed. On the other hand, sometimes the evidence is discovered as anticipated. In the antitrust area, where a plaintiff often must prove its case from the files and mouths of the defendants, an allowance of attorneys' fees would deter a party from pursuing what it in good faith believes is a valid claim.

C. Remedies of the Federal Rules of Civil Procedure are adequate to protect against frivolous litigation. For example:

1) Rule 11 places a duty upon the attorney that an action be filed only after "reasonable inquiry [that] it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass ..." Rule 11, if violated, calls for the imposition of sanctions, including the payment of costs and reasonable attorneys' fees. Rule 11 applies to antitrust cases. See the recent opinion in *RPS Corp. v. Owens-Corning Fiberglass Corp.*, No. 85-1146 (7th Cir. March 4, 1986).

2) Rule 12(a) provides various defenses including "failure to state a claim upon which relief can be granted". Rule 12(c) provides for "judgment on the pleadings". Thus, a defendant has available to it the vehicle to defeat early-on any claim lacking in legal merit.

In addition to the foregoing, a meritless antitrust suit filed for an anticompetitive purpose can itself form the basis of an antitrust violation. See the recent decision in *Richards v. Canine Eye Registration Foundation, Inc.*, No. 84-2185 (9th Cir. February 27, 1986); also *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 380 (1973).

law was more favorable to defendants, or when defendants engaged in so many activities, including mergers and vertical restraints, without any fear of liability. I challenge any of the lawyers or government officials testifying before this Committee to show otherwise.

We are all familiar with the changes in the law that have caused the decline in antitrust cases. One of the first changes was the case that delighted the Chicago School, *GTE Sylvania, Inc. v. Continental T.V., Inc.,* [2] which restored the rule of reason to the territorial restriction in the case and to non-price vertical restrictions generally. The law on vertical restrictions was further liberalized when the Supreme Court, in *Montanso Co.v. Spray-Right Service Corp.,* held that a price fixing agreement could not be inferred merely because termination occurred "in response to" complaints about price cutting. [3] In language that is too vague to provide much guidance, but by its very vagueness lets conservative courts expand the realm of the rule of reason, the Court held that "there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." [4]

The Court carried this line of thought to the limit in the recently decided *Zenith* case where it held that a plaintiff opposing summary judgment in a conspiracy case must prove that even though the facts warrant an inference of collusion, such an inference is *more* plausible than an inference of independent behavior. This, of course, places trial judges in the role of juries in answering the ultimate issue of whether the existence of a conspiracy is more likely than not an explanation of the defendants' conduct.

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[2] 433 U.S. 36 (1977).

[3] 104 S. Ct. 1464, 1470 (1984).

[4] *Id.* at 1471.

These attacks have gained currency because they have coincided with major dislocations of the American economy. Smokestack industries have shut down, the manufacturers of many products have moved abroad, manufacturers in the United States have shifted out of the Northeast, with much of the population following, and we have until recently gone through a period of intense inflation in the price of fuels used in our industrial processes. All of these changes have hurt American competitiveness, damaged our balance of payments, and led to a perception of declining American economic power. In this context, it has been too easy to place the blame on the antitrust laws.

Thus, we find that Douglas Ginsburg, the Assistant Attorney General for antitrust, leads the charge against treble damages by arguing that trebling has deterred much procompetitive conduct. His stated concern is that the threat of treble damages is discouraging firms from adopting efficient business practices, practices that would mean lower prices to consumers. 1/

I don't believe for a moment that concern with efficiency or consumer welfare is behind the proposed changes. Some corporations and their attorneys want to abandon treble damages for the same reason that they want to change the tort laws: they can transfer more profits from consumers to themselves without the antitrust laws.

There is a very simple reason why I am confident that today's proposals to cut back the antitrust laws are not really based on a concern with efficiency. The antitrust laws have never restrained business as little as they do today. In the twenty years that I have practiced antitrust law, this is the worst time, the hardest time, the least likely time, for a plaintiff to bring or win an antitrust case. Things have never been worse. I haven't filed a contingent fee antitrust case in three years. I can't imagine doing so again. The antitrust laws are so irrelevant to my practice that I no longer read the recent cases. In my twenty years of practice, there has never been a time when antitrust

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1/ Remarks of the Assistant Attorney General Douglas H. Ginsburg, 50 Antitrust & Trade Reg. Rep. (BNA) 175 (Jan. 23, 1986).

REMARKS OF STEPHEN D. SUSMAN OF HOUSTON, TEXAS ON S. 2162 BEFORE SENATE JUDICIARY COMMITTEE ON MAY 7, 1986

My name is Stephen D. Susman and I practice in Houston, Texas. I used to be a plaintiffs' antitrust lawyer. That was before the courts largely discouraged and I think almost ended effective private enforcement of the antitrust laws. In S. 2162, Congress threatens to *complete* the job. I appear here on behalf of no clients. I no longer represent antitrust plaintiffs. I appear here on my own nickel in honor of the memory of Hugo Black, for whom I clerked 20 years ago, a man who believed that private enforcement of the antitrust laws should be encouraged in order to preserve the American dream. I am here to speak about a proposal that would wipe out treble damages in all or most cases involving the *per se* areas of tying, group boycotts, and market division, as well as in cases of vertical restraints, section two cases, and merger cases, a proposal that would make every losing plaintiff liable for the defendants' attoneys' fees, and that would effectively preclude the filing and settlement of price-fixing class actions. My theme is "If it ain't broke, don't fix it!" With that theme, I don't need to use much time explaining what position I'm going to take in these remarks.

I.

The detrebling proposal is only part of a much larger, concentrated attack on the antitrust laws, an attack that also includes removing the no-contribution rule, making attorney's fees available for prevailing defendants, and watering down the merger guidelines. Some go-for-broke critics of the antitrust laws even want to do away with juries in antitrust cases. The real issue today is not why the Administration has proposed to remove the bulk of the treble damage protection for antitrust plaintiffs. The real question is why are all these proposals appearing now.

ever a plaintiff's claims are frivolous–well, that is OK; "unreasonable," questionable; and "bad faith" or "without foundation."

The "without foundation" standard is too broad. How could a consumer justify filing a price-fixing case, a class action, if he is faced with the threat of having to pay the defendant's legal bill if he loses? It really means that any plaintiff that loses will be liable for a defendant's attorneys' fees because, in hindsight, a jury or a judge will think that the case was without foundation.

Rule 11 goes far enough in dealing with frivolous cases, and rule 56, certainly after *Zenith*, goes far enough in dealing with nonmeritorious ones.

I want to end my remarks with a concession. I do not want anyone going away with the feeling that Steve Susman rejected the administration's package out of hand. I will therefore support the administration's proposal to give treble damages to the Government. For a proper contingent fee, I would even be willing to take on the role of special prosecutor in one of those Government treble damage cases myself.

In return, all I ask is that the committee and the Congress be reasonable, give a little, and leave treble damages where they have always been, at the core of private antitrust enforcement.

Thank you.

[The prepared statement and responses to questions follow:]

What lawyer among us has ever advised a client to risk violating the law simply because treble or punitive damages were unavailable?

Abandonment of treble damages as part of the Federal scheme will have these adverse effects: It will force creative plaintiffs' lawyers to use State antitrust laws and file their cases in State court rather than in Federal court. It will force them to go to State court, using creative common law theories, including breach of contract, fraud, UCC concepts of good-faith and fair dealing, where punitive damages are available.

It will force them to resort to RICO allegations in Federal court cases where treble damages are mandatory.

There are better alternatives to reform the antitrust laws. Let us deal with substantive changes in the law. If you want to make any change, make treble damages discretionary, and the very least you could do is, by statute, provide that a jury may be informed, which is not the law today, that actual damages will be trebled. That would be a change that goes a lot less far than the one presently proposed.

I would like to add a few words on the administration's other proposals. The claim reduction proposal has the same goal as decreasing the availability of treble damages, and I am against that proposal for the same reason.

I suspect that I bear some of the blame for this proposal because of my work for the antitrust plaintiffs in the *Corrugated Container* case. I am opposed to the proposal for these reasons: First, it gives relief to price fixers who are engaged in no socially useful conduct that we should be concerned about overdeterring.

Second, it assumes that the jury system is so prone to error that an innocent defendant cannot risk proving his innocence when the stakes are high.

Third, it precludes settlement with financially troubled defendants and places the risk of insolvency of a defendant on the victims rather than on the coconspirators.

Fourth, it makes it too expensive for the victims to obtain cooperation from settling defendants who wish to gain immunity in exchange for turning State's evidence.

Finally, it discourages settlement by lowering the risk that any defendant will have to pay more than its fair share, and thus makes trials of antitrust cases inevitable and frequently unmanageable if the number of coconspirators is large.

I am just as opposed to the administration's proposal for defendants' attorneys' fees. The possibility of such liability will deter many good-faith plaintiffs from asserting meritorious claims because they simply cannot assume the risk: they can barely afford to pay their own expenses, much less risk the possibility of paying a defendants' attorneys' fees.

These plaintiffs are usually in this position because the defendants have been so successful in putting them out of business.

If a defendants' attorneys' fee provision is adopted, it certainly should not be a provision with the administration's language. That provision would provide fees to substantially prevailing defendants—I mean, you do not even have to win the whole case; if you just win a large part of it, you can get fees as a defendant—when-

The treble damage remedy is a creation of necessity, the necessity brought on by the unequal wealth and resources of antitrust defendants and plaintiffs. The average terminated distributor has fewer resources than the terminating manufacturer.

Often, the distributor has been wholly put out of business and has no resources. The same is true, in general, of a competitor who falls victim to monopoly, attempts at monopoly, or restrictive practices forbidden by section 1.

The average consumer, of course, cannot imagine bringing an antitrust lawsuit on his or her personal resources. And in my experience—an experience, I am sure, borne out by that of the other practitioners who will be testifying before this committee—99.9 percent of antitrust competitor plaintiffs are significantly smaller than the defendants they sue.

These observations are confirmed by the Georgetown study, the largest study ever done of private antitrust litigation, and the first to analyze a large sample of cases. One result of that study was the finding that the size of defendants to plaintiffs on the average was 300 to 1.

The Georgetown study also illustrates my earlier comments that this is the worst time for an antitrust plaintiff. If the antitrust laws cause anticompetitive injury—which sounds like a nonsequitur to me, but that is what the administration is saying—that injury sure is disappearing.

The number of private lawsuits filed peaked in the late 1970's and has been decreasing since. Over 1,600 private cases were filed in 1977. By 1984, that number dropped to 1,200. At the same time, the number of summary dispositions throwing out antitrust lawsuits was surprisingly high and increasing.

Defense motions for summary judgment in 1984 were granted in 12 percent of the cases. Over 60 percent of defendants' motions for summary judgment in antitrust litigation were successful.

Another surprising fact is the small size of the average antitrust case. This fact brings into focus the critics' position that the antitrust laws are making our economy increasingly anticompetitive.

The study found that about half the cases involved no depositions, no requests for production of documents, no interrogatories. The average amount of time spent by executives on a case was only 30 hours.

The median settlement amount, which was not disclosed in all cases, was less than $50,000.

Those who contend that antitrust cases are more expensive to defend and settle than other cases should be asked for their evidence. Has anyone here, anyone that testified, ever heard of an antitrust case being settled for more than actual damages?

Treble damages are what make antitrust laws different, why businessmen consult lawyers before they engage in what they recognize may be anticompetitive practices, and why corporations have antitrust compliance programs.

There is no evidence of overdeterrence. No one has been able to come up with a single example of a business that declined to experiment with efficiency-creating conduct simply because of the fear of treble damages.

competitors, including potential competitors, are anticompetitive, not procompetitive.

That is why the administration says it wants to remove the treble damage incentive from this group of plaintiffs. In addition, as I have noted, the change in the law would probably mean that very few cases, except price-fixing cases, would ever be brought by anyone.

Now, the notion that suits by competitors are anticompetitive and that suits by consumers are not is just plain silly. In the first place, treble damages are designed as much to deter defendants as to encourage plaintiffs. Why else give treble damages to the Government which should need very little incentive to sue?

Second, many consumer cases are brought as class actions, and here it is the lawyers performing services on contingent fees, not the consumers, who need incentives. The consumers in those cases, the class plaintiffs whom I have represented in price-fixing cases, are indifferent. To examine into their motives and whether they are pure or impure would be stupid.

Third, competitors are often better equipped to bring all the facts to the court's attention than are consumers, and a more complete trial makes for a better result.

Finally, the administration ignores the possible savings in efficiency or the restoration of consumer welfare that might be created by competitor lawsuits. To be sure, the administration spokesman, Mr. Ginsburg, has raised the spectre of inefficiency. He says "the threat of a treble damages award may be used to force a competitively successful firm into abandoning or restricting conduct or arrangements that enhance efficiency and lower prices to consumers."

His basis for his statement seems to be his perception of bad motives of competitors, not some empirical study that competitor plaintiffs always bring anticompetitive lawsuits. How odd it is to focus on the motive of a competitor pursuing a business rival.

There is not a single example, and no one on this panel can cite any, where an efficient practice has been deterred by the threat of treble damages. There is no empirical study of this.

There is also no indication of how often a competitor's lawsuit is wholly warranted and prevents the defendant from charging higher prices, continuing anticompetitive practices, and usurping consumer welfare.

So far as I can tell, the rationale of the administration's proposal is just a bold assertion put forward on behalf of defendants who do not want to be restricted by the antitrust laws for any reason.

This makes you wonder whether a competitor ever brings a nonspurious lawsuit under the antitrust laws. It is interesting that one finds no mention of the cases competitor plaintiffs win in the remarks of the other panelists.

Is it the administration's position that these lawsuits are somehow so tainted that even if there is a legitimate recovery, it is bad for the economy? If so, why permit even actual damages when a competitor sues? If not, and if successful competitor lawsuits have the same meritorious effect on efficiency and consumer welfare as consumer lawsuits, why drop treble damages for one but not the other?

cy by increasing output and lowering prices to consumers"; "Antitrust laws do not outlaw every restraint on competition, do not prohibit innovation or strait-jacket experimentation or preclude any conduct that has a legitimate business purpose."

Now, if, in spite of these express instructions, plaintiffs are winning jury trials, it is only because defendants' counsel are spending more time trying to get the law changed than trying to learn how to persuade juries that anticompetitive and unfair practices are not the same thing.

I challenge anyone on these panels today to cite to this committee a single antitrust case that has been wrongly decided and in which a final judgment has been entered in the last 5 years.

The upshot of all this is reflected in the recent Georgetown study of private antitrust litigation, which I will discuss in detail in a few minutes. The number of private cases is dropping, the number of serious government cases is down, and the number of summary dispositions granted on both summary motions and motions to dismiss is way up.

There is a crisis in antitrust law today, but the crisis is not that the laws have become so powerful that they threaten competition. It is just the opposite. The laws have become so weak that businesses can operate free of legitimate, proper antitrust concerns. So the real title of my remarks should be, "If It Does Not Matter, Why Worry," and, more importantly, why now? What is the rush?

I have discussed our current situation at length because it is important to see where we really are. There is no crisis in antitrust overenforcement. There is no evidence that the antitrust laws are jeopardizing our economy or deterring socially-useful conduct.

With this background, let me talk about the administration's proposals on treble damages.

The application of the bill is not at all clear. Because the damages must be those sustained "by reason of such person having been overcharged or underpaid," apparently competitors cannot recover treble damages even in price-fixing cases like the *Zenith* case.

I do not know whether a consumer who paid a higher than normal price for a tied product or because of some exclusive distributorship agreement would be entitled to sue as a victim of an overcharge under the new provision.

Such a lawsuit would logically fit within the wording of the amendment, but it apparently would be outside the purpose. In any event, given the fact that cases concerning tying, market division, refusals to deal, vertical restraints, section 2, and mergers generally are brought by competitors, we can say that the administration's proposal effectively wipes out treble damages in these areas.

Now, we might find one or two consumers suing for an overcharge on a tying violation, but as a practical matter it is clear that the new proposal will restrict treble damages to buyers in price-fixing and bid-rigging cases.

I suspect the only reason the proposal is not written clearly and expressly limited to horizontal price fixing is to disguise just how much it takes away from current law.

This interpretation becomes clearer when we consider the stated justification for the new proposal. The reason for the rule, according to its proponents, is that suits by terminated distributors or treble damage protection for antitrust plaintiffs. The real question is why all these proposals are appearing now.

I do not believe for a moment that concern with efficiency or consumer welfare is behind the proposed changes. Some corporations and their attorneys want to abandon treble damages for the same reason they want to change the tort law. They can transfer more profits from consumers to themselves without the antitrust laws, and that is why I am confident that the proposals to cut back antitrust remedies are not really based on concern with economic efficiency.

The antitrust laws have never restrained business as little as they do today. In the 20 years that I have practiced antitrust law, this is the worst time, the hardest time, the least likely time for a plaintiff to bring or win an antitrust case.

Things have never been worse. I have not filed a contingent fee antitrust case in 3 years. I cannot imagine doing so in the future. The antitrust laws are so irrelevant to my practice today that I no longer read the recent cases.

In my 20 years of practice, there has never been a time when antitrust law was more favorable to the defendants or when defendants engaged in so many activities, including mergers and vertical restraints, without any fear of liability.

I challenge any of the lawyers or Government officials testifying before this committee to show otherwise.

We are all aware of the cases decided recently by the Supreme Court, restoring the rule of reason, doing away with the per se rule in so many areas, providing procedural outs for defendants that never existed before.

To cite only one example, in a recent Supreme Court case, the *Zenith* case, the Court held that a plaintiff opposing summary judgment in a conspiracy case must prove that even though the facts warrant an inference of conspiracy, such an inference is more plausible than an inference of independent behavior.

This, of course, places trial judges in the role of juries in answering the ultimate question of whether the existence of a conspiracy is more likely than not an explanation of the defendant's conduct.

The changes in the law have affected every businessman. It is hard to believe the talk about the anticompetitive threat of the antitrust laws when antitrust defendants have never had it so good.

Nor does the change in the case law adequately describe the whole change. The change reflects widespread adoption of the Chicago school principles. Those principles have led judges, even when acting within the boundary of settled law, to discourage antitrust litigation by acting negatively on discretionary motions and creating a climate in which antitrust plaintiffs face much more of a burden than simply proving the elements of their case by a preponderance of the evidence.

There is a grave danger today whenever a plaintiff files an antitrust case that that case will never come before a jury, and I really wonder whether the architects of the administration's proposal have read a jury charge in a case brought by a competitor recently: "Antitrust laws are designed to protect competition, not competitors;" "antitrust law's sole purpose is to increase economic efficien-

Law School, and now in private practice; and Judge Griffin Bell, the distinguished former Attorney General of the United States, who has been an active participant in the debate on antitrust remedies.

On our second panel will be Mr. James T. Halverson, the chairman of the American Bar Association's Section of Antitrust Law; Mr. John Irvine, an attorney from Houston, TX, on behalf of the U.S. Chamber of Commerce; Mr. Monroe Milstein, chairman of the board of Burlington Coat Factory, Inc., on behalf of the Association of General Merchandise Chains; and Mr. Thomas R. Long, general counsel of the Westvaco Corp., on behalf of the National Association of Manufacturers.

We welcome all of you and we look forward to an interesting discussion, and we will begin our first panel with Mr. Susman, if the first panel will come around—Mr. Susman, Mr. Gellhorn, and Judge Bell.

Judge Bell is on his way; I understand his plane has not arrived yet, but he will be here a little later.

You may proceed, Mr. Susman.

STATEMENT OF A PANEL CONSISTING OF STEPHEN D. SUSMAN, SUSMAN, GODFREY & McGOWAN, HOUSTON, TX; GRIFFIN B. BELL, KING & SPALDING, ATLANTA, GA; AND ERNEST GELLHORN, JONES, DAY, REAVIS & POGUE, WASHINGTON, DC

Mr. SUSMAN. Mr. Chairman, Senator Grassley, my name is Steve Susman and I practice law in Houston, TX. I used to be a plaintiffs' antitrust lawyer. That was before the courts largely discouraged and, in my opinion, ended the effective private enforcement of the antitrust laws. In Senate bill 2162, Congress threatens to complete that job.

I appear here, Senators, on behalf of no clients. I no longer represent antitrust plaintiffs. I appear here on my own nickel and in honor of the memory of Hugo Black, for whom I clerked 20 years ago, a man who believed that private enforcement of the antitrust laws should be encouraged in order to preserve the American dream.

I am here to speak about a proposal that would wipe out treble damages in all or most cases involving the per se areas of tying, group boycotts, and market division, as well as in vertical restraint, section 2, and merger cases; a proposal that would make every losing plaintiff liable for a defendant's attorneys' fees; and one that would effectively preclude the filing and settlement of price-fixing class actions.

My theme is, if it is not broke, do not fix it, and with that theme I need not spend much time explaining what my position is.

The detrebling proposal is part of a much larger, concentrated attack on the antitrust laws—an attack that also includes removing the no-contribution rule, making attorneys' fees available for prevailing defendants, and watering down the merger guidelines.

Some go-for-broke critics of the antitrust laws even want to do away with jury trials in antitrust cases. The real issue today is not why the administration has proposed to remove the bulk of the

ANTITRUST REMEDIES REFORM—S. 2022 AND S. 2162

WEDNESDAY, MAY 7, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Grassley, Heflin, Simon, McConnell, and Specter.

Staff present: Kenneth Starling, chief antitrust counsel; Alice Milder, counsel; and Chris Dunn, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

The committee is continuing a series of hearings on a comprehensive package of bills which I have introduced at the request of the administration to reform antitrust laws and procedures.

Today, we are holding the third hearing on a bill that would reform the system of remedies in antitrust suits. The administration's bill, S. 2162, contains recommendations for changing antitrust remedies in five areas: first, reducing treble damages in some cases; second, awarding treble damages in suits by the United States; third, claim reduction; fourth, attorneys' fees for defendants in some cases; and, fifth, interest on antitrust damage awards. Senator Metzenbaum has also proposed certain revisions to the antitrust remedies system.

The question of whether treble damages should be mandatory in antitrust suits and, if so, in which cases, has attracted a substantial amount of recent comment from antitrust scholars and practitioners, as well as from the business community.

The administration has recommended a system that would provide treble damages for the victims of overcharges, but actual damages for business rivals seeking to recover lost profits caused by antitrust violations.

We have invited a number of experienced witnesses on all sides of the issues to share their views with us. We will have two panels.

On the first panel will be Mr. Stephen Susman, a well-known plaintiffs' antitrust attorney from Houston, TX, and a participant in several recent programs on treble damages, including the Georgetown University study; Mr. Ernest Gellhorn, an antitrust law professor and dean of the Case Western Reserve University

Senator METZENBAUM. Yes, but they still have joint and several liability under those statutes.

Mr. HALVERSON. Yes, but they have a right of contribution, which they do not have under the Federal antitrust law. And the denial of a right of contribution deprives them of the right of going over against any of the other settling defendants, and nondefendants, which is the problem that creates enormous exposure for a nonsettling defendant.

Senator METZENBAUM. Doesn't S. 1300 actually make it easier for individual defendants for criminal violations than for companies liable for civil suits for personal injury?

Mr. SOUTENDIJK. Would you mind repeating the question, Senator?

Senator METZENBAUM. Doesn't S. 1300 make it easier on individual defendants for criminal antitrust violations than for companies that are liable in civil suits for personal injury? In other words, in civil suits for personal injury, you can have the joint and several liability; under S. 1300, you could not have it.

Mr. SOUTENDIJK. There would be a difference if S. 1300 were enacted into law. However, I think, Senator, that antitrust cases present a unique situation, because quite often, because of the class action rules, it is possible to have a lawsuit against an entire industry that involves a lot of defendants, large companies and small companies all put together as defendants in one case--which is not usual in the other areas of tort law.

So that I do think in the antitrust remedies area, we are facing a unique problem, which requires a unique solution.

Mr. WISEMAN. If I could add, Senator——

Senator METZENBAUM. Briefly, Mr. Wiseman. I am due at a television show in about 3 minutes.

Mr. WISEMAN. The problem here is not joint and several liability by itself. It is the combination of joint and several liability with class actions and treble damages. And that is the difference from personal industry cases.

Senator METZENBAUM. We may call you back, Mr. Wiseman, to testify on our side in connection with the U.S. Chamber of Commerce-supported legislation vis-a-vis personal injury cases.

Mr. WISEMAN. OK. [Laughter.]

Senator METZENBAUM. This hearing stands adjourned.

[Whereupon, at 12 o'clock, the committee was adjourned.]

Excerpt from ABA Antitrust Section, Monograph No. 11, _Contribution and Claim Reduction in Antitrust Litigation_ (1986), at 6-7, as quoted by J.T. Halverson in testimony on S. 1300 and S. 2162, April 15, 1986:

> "Thirty-nine states and the District of Columbia now permit some form of contribution among joint tortfeasors: thirty-six states have established contribution by statute;[37] in five states,[38] and the District of Columbia,[39] contribution has been authorized judicially.

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[37] _See_ ALASKA STAT. §§ 09.010-.060 (1980; ARIZ. REV. STAT. ANN. §§ 34-1001 to -1009 (1962); CAL. CIV. PROC. CODE §§ 875-880 (Deering 1973 and Supp. 1985); COLO. REV. STAT. §§ 13-50.5-101 to -106 (Supp. 1985); DEL. CODE ANN. tit. 10, §§ 6301-6308 (1975); FLA. STAT. ANN. § 768.31 (West Supp. 1985); GA. CODE ANN. § 105-2012 (1984); HAWAII REV. STAT. §§ 663-11 to -17 (1976); IDAHO CODE §§ 6-803 to -806 (1979); KAN. STAT ANN. § 602413 (1983); KY. REV. STAT. §§ 412.010-.050 (1981); LA. CIV. CODE ANN. art. 2103 (West Supp. 1977); MD. ANN. CODE art.50, §§ 16-24 (1979); MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (West Supp. 1981); MICH. COMP. LAWS ANN. §§ 600.2925a-.2925d (West Supp. 1982); MISS. CODE ANN. § 85-5-5 (1972); MO. REV. STAT. § 537.060 (1983); NEV. REV. STAT. §§ 17.225-.305 (1979); N.J. STAT. ANN. §§ 2A:53A-1 to -5 (West 1952); N.M. STAT. ANN. §§ 41-3-1 to -8 (1978); N.Y. CIV. PRAC. LAW §§ 1401-1404 (McKinney 1976); N.C. GEN. STAT. §§ 1B-1 to -7 (1983); N.D. CENT. CODE §§ 32-38-01 to -04 (1976 & Supp. 1985); OHIO REV. CODE ANN. §§. 2307.31, 2307.32 (Page 1981 & Supp. 1982); OKLA. STAT. tit. 12, § 832 (Supp. 1985); OR. REV. STAT. § § 18.440-.460 (1983); PA. STAT. ANN. tit. 42, §§ 8321 - 8327 (Purdon 1982); R.I. GEN. LAWS §§ 10-6-1 to -11 (1985); S.D. COMP. LAWS ANN. §§ 15-8-11 to -22 (1985); TENN. CODE ANN. §§ 23-3101 to -3106 (1980); UTAH CODE ANN. §§ 78-27-39 to -43 (1977); VA. CODE §§ 8.01-34, 8.01-35.1 (1984); W. VA. CODE § 55-7-13 (1981); WIS STAT. §§ 113.01 -.11 (1985); WYO STAT. §§ 1-1-110 to -113 (1977).

[38] Skimmer v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), _cert. denied sub nom._ Hinckley Plastic, Inc. v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Royal Indemnity Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975).

[39] Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949).

sonable, without foundation, or in bad faith." This standard is too broad. How could any consumer justify filing a price-fixing class action if faced with the threat of having to pay the defendants' legal bills if he loses? It really means that any plaintiff that loses will be liable for a defendants' attorneys fees because, in hindsight, the case was without foundation. Rule 11 goes far enough in dealing with frivolous cases, and R. 56 with non-meritorious ones.

IV.

Finally, I want to end my remarks with a concession. I do not want anyone to go away feeling that Stephen Susman rejected the Administration's package out of hand. I therefore will agree to support the Administration's proposal to permit the Federal Government to recover treble damages. For a proper contingent fee, I would even be willing to take on the role of special prosecutor in a few price fixing cases. In return, all I ask is that the Administration be reasonable, give a little, and leave treble damages where they belong at the core of the antitrust laws.

are filed at a healthy rate. The dismissal rate is lowest and the settlement rate is highest for price fixing cases.[32] These cases also have the biggest payoff.[33] Price fixing cases are more likely to follow government cases than are other types of cases.[34] With the likelihood of favorable outcomes and the existence of the per se rule (and I have not yet heard proposals to remove the per se status of horizontal price fixing, although I suppose that's next), treble damages are needed less in price fixing cases than in other types.

Treble damages are what makes antitrust laws different, why businessmen consult lawyers before they engage in what they recognize as anticompetitive practices, why corporations have antitrust compliance programs. There is no evidence of over deterrence:

1. No one has been able to come up with a single example of where a business declined to experiment with efficiency-creating restraints simply because of the fear of treble damages;
2. Who among us has ever advised a client to risk violating the law because treble or punitive damages were unavailable?

Abandonment of treble damages will force creative plaintiffs' lawyers:

1. to use state antitrust laws;
2. to use common-law theories including breach of contract, fraud, UCC concepts of good-faith dealing — where punitive damages are available, and
3. to resort to RICO allegations.

There are better alternatives:

1. Deal with substantive changes in laws;

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[32] T. Kauper & E. Snyder, Private Antitrust Cases That Follow On Government Cases 17 (unpublished paper Oct. 1985).

[33] P. Teplitz, supra note 24, at 3-16.

[34] T. Kauper & E. Snyder, supra note 37, at 30.

judgment were successful in 53.6 percent of the cases in which they were made, 68 percent if partially successful motions are included. 27/ The percentage of cases thrown out of court has increased in recent years. In 1983, 15.6 percent of all cases that ended were dismissed for failure to state a claim. Defense motions for summary judgment were granted in 11.7 percent of cases completed in 1984, with over 60 percent of the motions successful. 28/

Another surprising fact is the small size of the average antitrust case. This fact brings into question the critics' position that the antitrust laws are making our economy increasingly anticompetitive. The study found that about half of the cases involved no depositions, no requests for production of documents, and no interrogatories. 29/ The average amount of time spent by company executives on a case was only thirty hours. 30/ The median settlement amount, which was not disclosed in all cases, was less than $50,000. 31/ Those who contend that antitrust cases are more expensive to defend and settle than other cases should be asked for their evidence. Has anyone here heard of an antitrust case being settled for more than actual damages?

I have tried to show that there is no reason to remove the treble damage incentive from the many antitrust violations that are not price fixing. Another problem I have with the Administration's proposal is that if just one part of the antitrust laws gets to keep treble damages, price fixing does not need them the worst. Price fixing cases

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27/ S. Caulkins, supra note 28, at 62-63.

28/ Id. at 64-65 and accompanying notes.

29/ Teplitz, supra note 24, at 2 (executive summary).

30/ Id. at 2-12.

31/ Id. at 2-20 to 2-21.

One result of great interest was the finding that the size ratio of defendants to plaintiffs was 300 to 1.[22]

The Georgetown figures also illustrate my earlier comments that this is the worst time to be an antitrust plaintiff. If the antitrust laws cause anticompetitive injury, which sounds like a non sequitur to me but that's what the Administration is saying, that injury sure is disappearing. The number of private antitrust lawsuits filed peaked in the late '70's and has been decreasing since.[23] Over 1,600 private cases were filed in 1977. The number dropped to between 1,100 and 1,200 in 1983 and 1984.[24]

At the same time, the number of summary dispositions throwing out antitrust lawsuits was surprisingly high, and increasing. For the entire period, motions to dismiss for failure to state a claim were granted in 7.3 percent of the cases, and motions for summary judgment granted to defendants in 4.2 percent of cases. If partial grants are included, the figures rise to 9.2 percent and 5.3 percent, respectively.[25] So much for the Supreme Court's language in *Poller* about summary judgment being used "sparingly."[26] Motions to dismiss were granted in 44 percent of the cases in which they were filed, and for partial motions in 55.4 percent of the cases. Motions for summary

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[22] *Id.* at 2-5.

[23] S. Salop & L. White, Private Antitrust Litigation: An Introduction and Framework (unpublished draft Sept. 1985)

[24] *Id.*

[25] S. Caulkins, Equilibrating Tendencies of the Antitrust System, with Special Attention to Motions to Dismiss and for Summary Judgment 62-63 (unpublished draft Oct. 31, 1985).

[26] Poller v. CBS, 368 U.S. 464 (1962).

More to the point, the treble damage remedy is a creature of necessity, the necessity brought on by the unequal wealth and resources of antitrust defendants and plaintiffs. The average terminated distributor has many fewer resources than the terminating manufacturer — often the distributor has been wholly put out of business and has no resources. The same is true, on average, for the competitor who falls victim to monopoly, attempts at monopoly, or restrictive practices forbidden by section 1. The average consumer, of course, can't even imagine bringing an antitrust lawsuit on his or her personal resources. And in my experience, an experience that I am sure is borne out by that of other practitioners, 99 percent of antitrust competitor plaintiffs are significantly smaller than the defendants they sue.

These observations were confirmed in the Georgetown study, the largest study ever done of private antitrust litigation, and the first to analyze a large sample of cases. It looked at all private lawsuits filed in New York, Chicago, San Francisco, Atlanta, and Kansas City in the eleven-year period 1973-1983. Of the approximately 2,900 lawsuits that were filed, the study received data on over 1,900.

There were two significant limitations on the general study. First, M.D.L. cases generally were excluded because of their size and complexity. This amounted to well over 300 cases. Thus, many of the longer, more costly cases were excluded. Second, there was a bias among responding parties in favor of defendants in large cases.[21] It is hard to say how that would skew the specific data that will be discussed here, although defendants certainly would have an interest in overstating the disruption caused by antitrust cases.

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[21] P. Teplitz, Private Antitrust Litigation: An Overview 2-4 (draft Nov. 8-9, 1985).

competitive. This is a prejudice, not an empirical conclusion. When a distributor terminated because of price cutting sues the manufacturer, and breaks up a vertical price fixing scheme, that is a procompetitive, not anticompetitive, result. Indeed, this kind of vertical restraint is so anticompetitive that it remains a *per se* violation. When a competitor in a tied product market sues to recover damages, and in the process breaks up the tying scheme that forced consumers to buy an unwanted tied product and buy it at an unnecessarily high prices, that result is procompetitive. When a competitor successfully challenges a merger and prevents increased concentration in its market, with all the resulting increased prices and increase in monopoly profits, that result is procompetitive. When a competitor sues to prevent monopolization or attempted monopolization, again preventing unnecessary transfers of consumer welfare to the defendant, that result is procompetitive. When a competitor sues to remedy a group boycott or market division, practices intended to restrict competition and permit increased prices, and wins, that result is procompetitive. All this, let me add, is a conclusion drawn from elementary microeconomics, which in my understanding is the methodology propounded by all the Chicago School adherents. It is hard to disagree with those who say "let the punishment fit the crime," but all that means is that the availability of treble damages should turn on the nature of the violation (*e.g.*, horizontal, secretive), not on the identity of the plaintiff-victim. Yet S. 2162 makes the availability of treble damages depend solely on the relationship of the plaintiff to the defendant.

I have explained why horizontal price fixing is not the only antitrust cause of action worth enforcing. If that is true, there is no reason why these other causes of action are any less in need of the treble damage incentive. The remedy is designed both to deter and to compensate. Those interests are just as important in these other cases, and the treble damage incentive is just as badly needed, as in horizontal price fixing cases.

> Such practices [aggressive low pricing or innovative distributional practices] often are challenged by competitors or potential competitors with commercial or financial motives that diverge substantially from the public interest. . . . Spurious litigation to inhibit procompetitive practices imposes high costs on defendants and, ultimately, on the economy and consumers. [19/]

This makes you wonder whether a competitor ever brings a non-spurious lawsuit under the antitrust laws. Interestingly, I can find no mention of the cases competitor plaintiffs win in all these remarks. Is the Administration's position that these lawsuits are somehow so tainted that even if there is a legitimate recovery, it is bad for the economy? If so, why permit even actual damages when a competitor sues? If not, and if successful competitor lawsuits have the same meritorious effect on efficiency and consumer welfare as consumer lawsuits, why drop treble damages for one but not the other?

The Working Group also makes another curious statement. After discussing dropping treble damages except in lawsuits brought by plaintiffs who paid higher prices or, as sellers, received lower prices from defendants because of antitrust violations, the Group states that " [t] his proposal would increase somewhat deterrence of cartel behavior, while significantly eliminating deterrence of business conduct that may benefit consumers and the economy generally." [20/] I understand the second half of this sentence, but I wonder how leaving the treble damage remedy exactly where it is in pricing cases will increase the deterrence of cartel behavior.

There is a lot to say about what's wrong with the Administration proposal, but I will summarize the problems briefly.

First, as noted, the Administration's position rests on the assertion, for that is what it is, assertion, that competitor and terminated dealer lawsuits are generally anti-

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[19/] November 8 memo, supra note 16, at 946.

[20/] Id.

more complete trial makes for a better result. Finally, the Administration ignores the possible savings in efficiency, or the restoration of consumer welfare, that might be created by competitor lawsuits.

To be sure, the Administration's spokesman, Don Ginsburg has raised the spectre of inefficiency: "Thus, the threat of a treble damages award may be used to force a competitively successful firm into abandoning or restricting conduct or arrangements that enhance efficiency and lower prices to consumer." [18/] But the only basis for this statement appears to be Ginsburg's perception of the competitor's bad motive, not some empirical study showing that competitor plaintiffs somehow always bring anticompetitive lawsuits.

Note how odd it is for Ginsburg to focus on the *motive* of a competitor suing a business rival. The competitor's motivation, of course, is to recover damages and regain lost market share.

There is no indication how often the threat of treble damages induces a defending firm to abandon efficient practices when sued by a competitor. There is also no indication of how often a competitor's lawsuit is wholly warranted, and prevents the defendant from charging higher prices, continuing inefficient practices, and usurping consumer welfare. So far as I can tell, this is just bold assertion put forward on behalf of defendants who don't want to be restricted by the antitrust laws *for any reason*.

Ginsburg's remarks are almost word for word — indeed, at parts they are word for word — the same as those of the Administration's Working Group on Antitrust Review. In a November 8th Memorandum to the Cabinet Councils, the Working Group identified aggressive low pricing and innovative distributional practices (whatever that means) as practices that are being deterred by treble damages. They too seem to believe that competitors bring only spurious lawsuits.

[18/] Remarks of the Assistant Attorney General, *supra* note 1, at 175.

rently competitors cannot recover treble damages even in price fixing cases like the Zenith case. I don't know whether a consumer who paid a higher than normal price for a tied product, or because of some exclusive distributor arrangement, would be entitled to sue as the victim of an overcharge under the new provision. Such a lawsuit could logically fit the wording of the amendment, but it apparently would be outside its purpose. In any event, given the fact that cases concerning tying, market division, refusals to deal, vertical restraints, section 2, and mergers generally are brought by competitors, we can say that the Administration's proposal effectively wipes out treble damages in these areas. We might find one or two consumers suing for an "overcharge" on a tying violation, but as a practical matter it is clear that the new proposal will restrict treble damages to buyers in price fixing and bid rigging cases. I suspect the only reason the proposal is not written clearly and expressly limited to horizontal price fixing is to disguise just how much it takes away from current law.

This interpretation becomes clearer when we consider the stated justification for the new proposals. The reason for the rule, according to its proponents, is that suits by terminated distributors or competitors, including potential competitors, are anticompetitive, not procompetitive. That is why, so the Administration says, it wants to remove the treble damage incentive from this group of plaintiffs. In addition, as I have noted, this change in the law would probably mean that very few cases except price fixing cases would ever be brought by anyone.

The notion that suits by competitors are anticompetitive and that suits by consumers are not, is just silly. In the first place, treble damages are designed as much to deter defendants as to encourage plaintiffs. Why else give treble damages to the Government which should need little incentive to sue? Secondly, many consumer cases are brought as class actions and here it is the lawyers (performing services on a contingent fee basis) who need incentives, not the consumers who are often indifferent. Third, competitors are often better equipped to bring all the facts to the court's attention and a

The upshot of all this is reflected in the recent Georgetown study of private antitrust litigation, which I will discuss in more detail later. The number of private cases being filed is dropping, the number of serious government cases — and here I exclude the bid rigging cases which the government files to give an appearance of activity — is down, and the number of summary dispositions granted on both summary judgments and motions to dismiss is way up. There is a crisis in antitrust law, but the crisis is not that the laws have become so powerful that they threaten competition. It is just the opposite. The laws have become so weak that businesses can operate free of legitimate, proper antitrust concerns. So the real title of my remarks should be: "If it doesn't matter, why worry?" And more importantly, "Why now? What's the rush?"

II.

I have discussed our current situation at such length because it is important to see where we really are. There is no crisis of antitrust over-enforcement, and there is no evidence that the antitrust laws are jeopardizing our economy.

With this background, I want to talk about the Administration's proposal on treble damages.

The Administration's proposal is to limit civil damages to actual damages unless the damages resulted from an overcharge or underpayment caused by an antitrust violation. In the latter case, treble damages will still be permitted if the lawsuit is brought by the buyer or seller. The purpose of the provision is to permit purchasers or sellers to recover treble damages for price fixing or bid rigging, but to block treble damages in other areas, particularly lawsuits brought by distributors or competitors. [17]

The application of this bill is not at all clear. Because the damages must be those "sustained by reason of such person having been overcharged or underpaid," appa-

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[17] See November 8 Memo to Cabinet Councils on Changes in Antitrust Laws, reprinted in 49 Antitrust & Trade Reg. Rep. (BNA) 946 (Nov. 28, 1985).

Corp.,[15] the Court abandoned the intra-enterprise conspiracy doctrine. Perhaps worst of all for plaintiffs, the Court in a recent civil rights case has indicated that a multiplier for attorneys fees should now be the exception, not the rule.[16]

These changes in the law have affected every businessman. It is hard to believe the talk about the anti-competitive threat of the antitrust laws, when antitrust defendants have never had it so good. Nor does the change in caselaw adequately describe the whole change. That change reflects the widespread adoption of Chicago school principles. These principles have led judges, even when acting within the boundary of settled law, to discourage antitrust litigation by acting negatively on discretionary motions and creating a climate in which antitrust plaintiffs face much more of a burden than simply proving the elements of their case by a preponderance of the evidence.

I wonder whether the architects of the Administration's proposal have read a jury charge in a case brought by a competitor recently?

> "Antitrust laws are designed to protect competition, not competitors."
>
> "Antitrust laws sole purpose is to increase economic efficiency by increasing output and lowering prices to consumers."
>
> "Antitrust laws do not outlaw every restraint on competition, do not prohibit innovation or strait jacket experimentation or preclude any conduct that has a legitimate business purpose."

If in spite of these express instructions, plaintiffs are winning jury trials it is only because defendants' counsel are spending more time trying to get the laws changed than trying to learn how to persuade juries that anticompetitive and unfair practices are not the same thing! I challenge anyone to show me an antitrust case that has been wrongly decided and in which a final judgment has been entered in the last five years!

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[15] 104 S. Ct. 2731 (1985).

[16] *Blum v. Stenson*, 104 S. Ct. 1541 (1985).

vant markets that tying is at best a quasi per se violation. Tying cases have become increasingly unattractive as the courts have more and more appropriated the power to decide, as a matter of law, these factual questions of the separateness of products and the extent of the market. The Supreme Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde* [8] is a good example. In *Hyde* the Court rejected out of hand the factual possibility that market imperfections, including a lack of information and price consciousness, could create market power. [9]

The Court has been just as active in raising procedural barriers that have blocked antitrust plaintiffs. The most prominent of these, of course, is the indirect purchaser rule of *Illinois Brick Co. v. Illinois.* [10] *Illinois Brick* was followed just a few years ago by the *Associated General Contractors* case, another case restricting the range of persons who could sue under the antitrust laws. [11] Things haven't gotten better since that decision. Just last term the Court held that antitrust claims, at least in certain agreements concerning international trade, are arbitrable. [12] Although the Court did base its decision on concerns of international comity, following *Scherk v. Alberto-Culver Co.,* [13] it also criticized in dictum the generally settled rule that antitrust claims are not arbitrable. [14] In *Copperweld Corp. v. Independence Tube*

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[8] 104 S. Ct. 1551 (1984).

[9] *Id.* at 1566.

[10] 431 U.S. 720 (1977).

[11] 103 S. Ct. 897 (1983). I discussed *Associated General Contractors* and *Blue Shield v. McCready,* 102 S. Ct. 2540 (1982), in Susman, *Standing in Private Antitrust Cases: Where is the Supreme Court Going?,* 52 Antitrust L.J. 465 (1983).

[12] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 105 S. Ct. 3346 (1985).

[13] 417 U.S. 506 (1974).

[14] 105 S. Ct. at 3355.

I am acutely aware of this change in the law because the Fifth Circuit has recently reversed and remanded a $1.8 million verdict won by my firm in a vertical price fixing case. We represented a terminated distributor who sued Sharp Electronics Corporation. We submitted an interrogatory to the jury asking whether it found an agreement or understanding between the defendant and a competing dealer to terminate our client because of his price-cutting. The Fifth Circuit reversed because, it held, the instruction had to ask the jury to find that the manufacturer and competing distributor expressly or impliedly agreed to set prices at some level. Asking whether the manufacturer had a section I understanding or agreement to terminate our client because of his price cutting was not enough. Although I do not think that this holding reflects the law even today, and if it does, it contradicts cases like *Dr. Miles*, [5] the important point is that no circuit court would have reached this decision ten years ago.

There have been changes in many other areas. Courts have shown an increasing willingness to weigh the competitive effects of conduct before deciding whether the per se rule applies, thus defeating the very purpose of a per se rule. The two recent cases I have in mind are *Broadcast Music Co., Inc. v. Columbia Broadcasting System, Inc.*, [6] and last term's group boycott case, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, [7] We are all familiar with the decline in predatory pricing cases caused by the influence of Professors Areeda and Turner, and the increasing disfavor of Robinson/Patman cases. We are all aware of the dramatic increase in mergers, an increase that speaks louder than words about the permissiveness of the Justice Department's merger guidelines. Finally, we all know that the supposedly "per se" violation of tying already involves so much threshold analysis of separate products and rele-

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[5] *Dr. Miles Medical Co. v. John Park*, 220 U.S. 373 (1911).

[6] 441 U.S. 1 (1979).

[7] 105 S. Ct. 2613 (1985).

and should always be condemned, while other conduct can be judged only after its justifications, its market context, and its procompetitive potential have been studied and weighed.[9] In most cases, in fact, the antitrust legality of business behavior is judged according to a "rule of reason". Under the rule of reason conduct is evaluated according to its overall purposes and effects in the specific market circumstances in which it occurs. Only a small set of business practices have been thrown into what one appellate court recently called the "fiery pit" of *per se* liability.[10] These are practices that have proven after long experience to be without redeeming competitive virtue.[11] The Justice Department generally reserves criminal prosecution for conduct that the courts regard as *per se* unlawful.

While the courts and the Department of Justice have long followed similar distinctions between conduct that ought to be universally condemned and conduct of more ambiguous legality, the private antitrust remedies do not permit this distinction. The relevant statutory provision requires the trebling of damages in all private damage cases. Thus the harsh remedies appropriate for the minority of cases apply to all unlawful conduct, even though the law. No responsible business wants to engage in activity that carries any appreciable risk of criminal prosecution.

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[9] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[10] *Phillips v. Vandygriff*, 711 F.2d 1217, 1231 (5th Cir. 1983).

[11] *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

Enforcement policy at the Department of Justice has generally reserved criminal prosecution for bid-rigging, price-fixing, and other similar behavior.[5] While new categories of conduct are occasionally brought within the area of potential criminal prosecution, the Antitrust Division usually gives fair warning when its policies are about to shift in this respect. In recent years this has been the case with respect to vertical price-fixing[6], movie industry "splitting"[7], and attempts to form market-dominating combinations[8]. In any case, the areas in which criminal prosecution has been viewed as appropriate are narrow and exceptional.

The courts have also observed important distinctions among different varieties of business conduct that are prohibited under the antitrust laws. The courts recognize and appreciate that some business conduct -- bid-rigging, for example -- is reprehensible

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[5] See, Antitrust Division, U.S. Department of Justice, Antitrust Division Manual III 10-11 (1979)(criminal process reserved for per se violations or cases showing knowing disregard of legal standards).

[6] See, Sanford M. Litvack, Report from the Antitrust Division, 49 Antitrust L.J. 1073 (1980)(signaling future criminal prosecution of vertical price fixing). This enforcement policy was abandoned by Mr. Litvack's successor as Assistant Attorney General for Antitrust.

[7] See Greenbrier Cinemas, Inc. v. Attorney General, 511 F.Supp. 1046 (W.D. Va. 1981)(change in policy signaled by press release).

[8] United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984)(change in policy signaled by public statement).

Any respectable system of law will try to observe the maxim, "let the punishment fit the crime". If punishments are too lenient, illegal conduct will continue undeterred and its victims will suffer. If punishments are too severe, however, the system of law may come into disrepute because its results seem arbitrary or capricious.

Antitrust violations unjustly enrich the wrongdoers at the expense of consumers, leading to the waste of our scarce resources. On the other hand, excessive antitrust remedies will lead businesses to avoid beneficial conduct if such conduct tends to create a mistaken appearance of impropriety. This can lead business managers to be timid when success requires creativity and bold experimentation. At a time when economic progress and competitive success are at a premium, neither of these consequences should be lightly tolerated.

In order to determine whether the antitrust remedies are set at appropriate levels, we must recognize the special enforcement context in which they are applied. Violations of the Sherman Act are punishable by both criminal and civil remedies. Only the Department of Justice can seek criminal remedies, and its enforcement policies have therefore become critical to the effects of antitrust on business conduct. My experience is that most businesses willingly conform their operations to the requirements of disputes that inevitably result from aggressive competition. If we continue to eliminate or streamline government constraints on business conduct, we should be certain that our antitrust laws are sound and that they are effectively enforced.

The reforms contained in the bills now before the Committee should be viewed in recognition of this need to revitalize antitrust. They should be regarded as presenting an opportunity to strengthen and invigorate the laws that govern business conduct. There are some legitimate concerns with our antitrust enforcement process, and they deserve to be addressed. None of these concerns, however, should be regarded as any reason to abandon our fundamental national policy in favor of free market competition. Just as our Constitution has served us well in the realm of politics and government, the basic antitrust statutes enacted by Congress have served us well in guiding the Nation's economic progress.

With this background I would like to focus the remainder of my testimony on the most significant proposal among those pending before the Committee, Title II of S. 2162. As explained further below, I believe this proposal deserves careful study and full consideration by the Committee. By suggesting a departure from the rule of mandatory treble damages, this aspect of the bill would attempt to confront a serious criticism of our basic antitrust enforcement scheme.

government regulation, deficit spending, and protection of domestic industries from foreign competition. We now regard those alternatives as questionable because in the long run they led to problems worse than those they were created to solve.

The most recent Presidential Commission on antitrust studied a wide variety of industries and economic sectors in which free markets had been replaced with antitrust exemptions and government regulation. In almost every instance the Commission found that the alternatives had failed, and that the role of competition subject to antitrust should be expanded.[4] In every area it examined, it concluded that antitrust exemptions should be repealed or reduced in scope.

The Commission's Report was released in the midst of a series of legislative and regulatory changes in the transportation, communication, financial, and other sectors. A thicket of administrative regulation was cut down, and competitive market forces were again unleashed. The popularity of these reforms helped put the current Administration into office on a broader platform of reducing the size of government and limiting regulatory interference in the economy.

As our entrepreneurs and managers learn to take advantage of their new flexibility in deregulated markets, antitrust will become even more important as a legal mechanism for resolving the variety of amendments over the years. The antitrust laws have been studied intensively on several previous occasions. When I was serving as Attorney General a Presidential Commission examined the significant antitrust issues of that time.[3]

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[4] 2 National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General (1979).

I do not recite this history to evoke nostalgia, but for several purposes relevant to these proceedings. We should recognize that the antitrust laws are with us today in their present form not only because of what Congress thought and did in 1890, but also because of the ideas and initiatives of many Congressional sessions since. The existing laws are the combined product of many eras in American history, not just that of Senator Sherman. Our basic policy of competition subject to antitrust rules has been reexamined and reaffirmed many times. If there is broad support today for an attempt to abandon the basic policy choice of free enterprise subject to antitrust rules, it must have arisen very suddenly indeed.

My second point in mentioning the history of antitrust reform is to emphasize that antitrust today stands very much where democracy stood according to Winston Churchill -- it's a terrible system that is far superior to all of the alternatives. In the 1930's, when our economy suffered its worst breakdown and faith in free markets was at its historic low, the Nation experimented with a variety of alternative economic policies. These included

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[3] National Commission for the Review of Antitrust Laws and Procedures.

Statement of

GRIFFIN B. BELL

King & Spalding

Mr. Chairman and members of the Committee:

I am pleased to have this opportunity to assist you in considering S. 2162, the "Antitrust Remedies Improvements Act of 1986"[1], and S. 2022, the "Antitrust Improvement Act of 1986". As a federal judge, as United States Attorney General, and as a lawyer in private practice, I have been involved with many of the issues and circumstances relevant to these proposals. I am glad to put my experience at your service, and I hope you find this testimony useful.

Let me begin by placing these proposals in overall perspective. As you know, the Sherman Act[2] is approaching its centennial. Following the policies of free enterprise and competition that Congress chose in 1890, the United States has become the world's greatest economic power. In recent years, however, our economic preeminence has been threatened. We are all searching for ways to respond effectively to that threat. As part of this process the antitrust laws have come under intense scrutiny again.

I use the word "again" advisedly. The antitrust laws have never been regarded as immutable. Congress has amended them often as the views and demands of the circumstances have required. New provisions have been added, and specific concerns have led to a tory rule like that contained in 2162. I am just giving you another approach to it.

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[1] Title IV of S. 2162 (Claim Reduction), together with other proposals addressed to the problems of antitrust damage allocation, has been the subject of prior hearings. Accordingly this testimony does not address Title IV specifically.

[2] 15 U.S.C. §§ 1-7.

The idea of departing from the rule of mandatory trebling of private antitrust damages is not new. Several recent statutory reforms have made significant use of departures from mandatory trebling in areas where the punitive and deterrent effects of this remedy have given rise to potential conflicts with other policies. These include the Export Trading Act of 1982, the Local Government Antitrust Act of 1984, and the National Cooperative Research Act.

In conclusion, simple justice supports the idea of fine-tuning the severity of antitrust remedies to fit the nature of the specific conduct and the purposes of the law. Both the judicial rules of substantive antitrust law and the enforcement policies of the Department of Justice have long reflected that antitrust violations differ significantly in the nature and degree of the penalties they deserve.

There is a sound basis for the view that the private antitrust remedies should also reflect these differences. S. 2162 provides a good starting point for discussion and I urge the committee to explore title II thoroughly, along with any suggested alternative approaches

Thank you, Mr. Chairman.

[The prepared statement and responses to questions follow:]

to be without redeeming competitive virtue. The Justice Department generally reserves criminal prosecution for conduct that the courts regard as per se unlawful.

Now, while the courts and the Department of Justice have long followed similar distinctions between conduct that ought to be universally condemned and conduct of more ambiguous legality, the private antitrust remedies do not permit this distinction. That is the point of the hearing today.

The relevant statutory provision requires the trebling of damages in all private damage cases. Thus, the harsh remedies appropriate for the minority of cases apply to all unlawful conduct, even though the legality of most conduct is regarded as ambiguous by both the courts and the Department of Justice.

This situation is probably unique in our legal system. Under common law principles, a party injured by negligence, for example, can recover only actual damages. Punitive or exemplary damages are available only for intentional or otherwise reprehensible conduct.

Mandatory treble damages have a rationale, however, that is not typical of other fields of law. This unique explanation for multiple antitrust damages is referred to as a private attorney general purpose. In theory, treble damages act as a subsidy to private parties who might not otherwise pursue claims against wrongdoers.

The validity of the private attorney general rationale seems to depend on the nature of the violation involved. If injured parties realize the source of harm, it is unclear why they cannot be expected to bring suit to recover for their injuries even if only single damages are available.

It can be argued that an injured party will not seek redress when the size of the claim is insufficient to justify the necessary legal fees. In antitrust law, however, a successful claimant's attorney's fee is also mandatory. Thus, any party who has suffered injury should have a sufficient incentive to seek redress.

A more substantial basis for the trebling of antitrust damages can be found where the nature of the violation gives rise to the possibility that victims will not realize that they are being harmed by the illegal conduct.

This problem is most serious for secret bid-rigging conspiracies and similar violations. For conduct of this nature, effective deterrence may require increased damages to compensate for the low probability of detection and punishment.

S. 2162 appears to address this concern for retaining treble damages where the victim has been forced by the violation to pay overcharges or underpayments. This approach permits treble damages for the class of violations for which the problem of detection are the most severe.

There may be other types of violations where such problems are equally severe. Perhaps claimants could be permitted to demonstrate this in other cases on a case-by-case basis, leaving the single or treble damage question to the trier of the facts, thereby entitling them in some other cases to treble damages.

This would introduce a new and important issue into antitrust cases and would not have the administrative simplicity of a statuposal deserves careful study and full consideration by the committee.

By suggesting a departure from the rule of mandatory treble damages, this aspect of the bill would attempt to confront a serious criticism of our basic antitrust enforcement scheme.

Any respectable system of law will try to observe the maxim, "Let the punishment fit the crime." If punishments are too lenient, illegal conduct will continue undeterred and its victims will suffer. If punishments are too severe, however, the system of law may come into disrepute because its results seem arbitrary and capricious.

Antitrust violations unjustly enrich wrongdoers at the expense of consumers. On the other hand, excessive antitrust remedies will lead businesses to avoid beneficial conduct if such conduct tends to create a mistaken appearance of impropriety. This can lead business managers to be timid when success requires creativity and bold experimentation. At a time when economic progress and competitive success are at a premium, neither of these consequences should be lightly tolerated.

In order to determine whether the antitrust remedies are set at appropriate levels, we must recognize the special enforcement context in which they are applied. Violations of the Sherman Act are punishable by both criminal and civil remedies.

Only the Department of Justice can seek criminal remedies, and its enforcement policies have therefore become critical to the effects of antitrust on business conduct. My experience is that most businesses willingly conform their operations to the requirements of the law. No responsible business wants to engage in activity that carries any appreciable risk of criminal prosecution.

Enforcement policy at the Department of Justice has generally reserved criminal prosecution for bid rigging, price fixing, and other similar behavior. While new categories of conduct are occasionally brought within the area of potential criminal prosecution, the Antitrust Division usually gives fair warning when its policies are about to shift in this respect.

In recent years, this has been the case with respect to vertical price fixing, movie industry splitting, and attempts to form market dominating combinations. In any case, the areas in which criminal prosecution has been viewed as appropriate are narrow and exceptional.

The courts have also observed important distinctions among different varieties of business conduct that are prohibited under the antitrust laws. The courts recognize and appreciate that some business conduct—bid rigging, for example—is reprehensible and should always be condemned, while other conduct can be judged only after its justifications, its market context, and its procompetitive potential have been studied and weighed.

In most cases, in fact, the antitrust legality of business behavior is judged according to the rule of reason. Under the rule of reason, conduct is evaluated according to its overall purposes and effects in the specific market circumstances in which it occurs.

Only a small set of business practices have been thrown into what one appellate court recently called the fiery pit of per se liability. These are practices that have proven after long experience provisions have been added, and specific concerns have led to a variety of amendments over the years.

The antitrust laws have been studied intensively on several previous occasions. For example, when I was serving as Attorney General, a Presidential commission examined the significant antitrust issues of that time.

The existing antitrust laws are the combined product of many eras in American history, not just that of Senator Sherman. Our basic policy of competition subject to antitrust laws has been reexamined and reaffirmed many times.

My second point in mentioning the history of antitrust reform is to emphasize that antitrust law today stands very much where democracy stood, according to Winston Churchill. It is a terrible system that is far superior to all of its alternatives.

In the 1930's when our economy suffered its worst breakdown and faith in free markets was at its historic low, the nation experimented with a variety of alternative economic policies.

These included Government regulation, deficit spending, and protection of domestic industries from foreign competition. We now regard those alternatives as questionable because in the long run they led to problems sometimes worse than those that they were created to solve.

The most recent Presidential Commission on Antitrust—that was the one that took place in 1979—studied a wide variety of industries and economic sectors in which free markets had been replaced with antitrust exemptions and government regulation.

In almost every instance, the Commission found that the alternatives had failed and that the role of competition subject to antitrust should be expanded. In every area the Commission examined, it concluded that antitrust exemptions should be repealed or reduced in scope.

Since then, as our entrepreneurs and managers have learned to take advantage of their new flexibility in deregulated markets, antitrust has become even more important as a legal mechanism for resolving the disputes that inevitably result from aggressive competition.

If we continue to eliminate or streamline Government constraints on business conduct, we should be certain, too, that our antitrust laws are sound and that they are effectively enforced.

The reforms which are contained in the bills now before this committee should be viewed in recognition of this need to revitalize antitrust. They should be regarded as presenting an opportunity to strengthen and invigorate the laws that govern business conduct.

There are some legitimate concerns with our antitrust enforcement process, and they deserve to be addressed. None of these concerns, however, should be regarded as any reason to abandon our fundamental national policy in favor of free market competition.

Just as our Constitution has served us well in the realm of politics and Government, the basic antitrust statutes enacted by Congress have served us well in guiding the Nation's economic progress.

With this background, I would now like to focus on the most significant proposal among those pending before the committee, which is title II of S. 2162. As explained further below, I believe this pro-

The CHAIRMAN. Thank you very much, Mr. Susman. We appreciate your being here and the long distance you have traveled, and the committee is indebted to you for your testimony.

Mr. SUSMAN. Thank you, sir.

The CHAIRMAN. Judge Bell, if you will come around next, I had you down——

Judge BELL. Good morning, Mr. Chairman.

The CHAIRMAN. Your plane was a little late, and so we let Mr. Susman go ahead. Now, Judge Bell, we can put your entire statement in the record and let you summarize it, or any way you want to handle it.

Judge BELL. Your Honor, I will put my statement in the record.

The CHAIRMAN. Just handle it any way you want to.

Judge BELL. I probably ought to go over part of my statement.

The CHAIRMAN. I will leave that to your discretion.

Judge BELL. I do not know how much time the committee has.

The CHAIRMAN. Well, how much time——

Judge BELL. You know, I can say it in a minute that I favor——

The CHAIRMAN. We want to give you what you feel you need. How much time do you feel you need?

Judge BELL. Well, I think 10 minutes.

The CHAIRMAN. That will be fine, and your entire statement will go in the record if you do not cover everything.

Judge BELL. I will take the statement and sort of skim it.

The CHAIRMAN. Yes, sir.

Judge BELL. But I will take 10 minutes.

The CHAIRMAN. The main thing is we would like to get your thrust of this thing, just to get your practical views.

STATEMENT OF HON. GRIFFIN B. BELL

Judge BELL. Well, I will say in the beginning that I favor legislation of this type. I think there has to be some distinction between the severity of misconduct. Not all misconduct is maximum; some is minimum. It depends on the facts of the particular matter.

It seems unusual in a country like ours, which is dedicated to due process and equal protection, that you would fine everybody the same, no matter the severity of their conduct. That has always been a weakness in the antitrust laws, I think, and in a lot of these treble damages statutes.

So I think there are some kinds of conduct where single damages would be appropriate, plus attorneys' fees.

The Sherman Act is now almost 100 years old. Following the policies of free enterprise and competition that Congress chose in 1890, the United States has become the world's greatest economic power.

In recent years, our economic preeminence has been threatened. We are all searching for ways to respond effectively to that threat. As part of this process, the antitrust laws have again come under intense scrutiny.

I use the word "again" advisedly. The antitrust laws have never been regarded as immutable. Congress has amended them often as the views and demands of the circumstances have required. New petitors, rather than consumers, are more likely to be in a position to identify the existence of anticompetitive schemes. No research indicates that consumer class actions are the most efficient method of policing anticompetitive conduct, and no logic supports the notion that two injured businesses should be treated differently depending on whether one is a customer and the other a competitor of antitrust violators.

I discussed problems with the Working Group's proposals, and the conclusions of the Georgetown Study, on pages 9 through 16 of my remarks before the Senate on May 7, 1986. I have attached a copy for your convenience and that of Senator Specter.

2. I would welcome the extension of treble damages to the United States. I would not, of course, limit treble damages for the Government just to overcharge or underprice cases. Treble damages should be available to the Government in exactly the same circumstances as to private plaintiffs. Government spending is difficult to control, so the potential for abuse by antitrust violators who supply goods and services to the Government is great. At the same time, the absence of normal market mechanisms makes it easier for Government agencies to suffer in silence and pass on to the voters the higher cost of monopolistic practices and other antitrust violations that may have been committed by Government suppliers.

My perception is that treble damages have successfully provided a strong incentive for private parties to enforce the antitrust laws, and have provided an equally strong deterrent for businesses not to commit antitrust violations. I would expect these same factors to operate if the Government received the right to recover treble damages.

3. There is no need to amend the antitrust laws to add an attorneys' fees provision for private defendants. Rule 11 of the Federal Rules of Civil Procedure already authorizes the courts to award sanctions, including dismissal of lawsuits or imposition of attorneys' fees or other fines. Rules 12 and 56 provide mechanisms for the courts to dismiss non-meritorious cases. Critics of the antitrust laws speak freely about "frivolous" cases, but I have yet to hear of a "frivolous" or wrongly decided antitrust case that went to final judgment in the past 5 or 10 years. The courts already have the powers — which they are readily exercising — to weed out the frivolous cases.

In addition, the wording of S. 2162, which would award attorneys' fees to "substantially" prevailing defendants, even limited to cases that are "unreasonable" or "without foundation", would have a chilling effect on antitrust plaintiffs. If a defendant can persuade a jury that it is innocent, it can also probably persuade the jury that the lawsuit was "without foundation." Most plaintiffs don't have the resources to risk an adverse judgment if the loss is accompanied by the threat of attorneys' fees, as is obvious from the recent Georgetown Study. This proposal would deter much meritorious antitrust litigation, and should be rejected.

As for the two "questions for the panels," my answers are "no" and "no."

As noted, I have attached two typed copies of the remarks I gave on May 7, 1986. Those remarks spell out my answers to your questions in greater detail.

Please contact me if I can be of any further assistance.

Sincerely yours,

Stephen D. Susman

bd/01/96
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May 19, 1986

Via Federal Express

Hon. Strom Thurmond
United States Senate
Committee on the Judiciary
Washington, DC 10510

Dear Senator Thurmond:

Thank you for your letter of May 7 requesting my views on the current debate over antitrust damages. My response to your numbered questions are as follows:

(1) I have read a number of summaries and analyses of the Working Group and its conclusions on antitrust laws. I have never seen any mention, by the Working Group or others, of any factual findings that support the Group's proposed limitation on treble damages to plaintiffs who have "been overcharged or underpaid by any person subject to liability under the antitrust laws . . . ." Nor have I ever in my years of practice seen any study that suggests that pricing violations are more anticompetitive or pernicious than other exclusionary or monopolistic practices, or that consumer lawsuits are somehow more meritorious (and therefore deserve to keep treble damages) than competitor lawsuits.

I am strongly opposed to the Administration's proposed elimination of treble damages in areas other than those involving overcharges or underpayment suffered by consumers. I have reviewed the recent Georgetown Study, the largest study ever done of private antitrust litigation. That study looked at all private antitrust lawsuits filed in New York, Chicago, San Francisco, Atlanta, and Kansas City in the 11 years from 1973 through 1983. Among that study's findings are the fact that the number of private antitrust lawsuits has been decreasing since the late 70's, and the number of summary dispositions throwing out antitrust lawsuits is both high and increasing. These studies showed that the average antitrust lawsuit is quite small — indeed, about half the cases studied involved no depositions, requests for production of documents, or interrogatories. Those are hardly the kind of lawsuits likely to deter efficient business practices, although that fear is the basis for the Working Group's proposals. At the same time, the study showed that the average size ratio of defendants to plaintiffs was 300 to 1. Thus the incentive of treble damages is critically needed to continue efective private antitrust enforcement.

The proposal to limit the treble damage remedy to consumers is a transparent effort to deprive those businesses most directly harmed by many antitrust violations of the incentive to remedy such injuries. It is thus both bad policy and unequal justice. Limiting the treble damage remedy to consumers limits the remedy to that level of the market where the effects of an antitrust violation are usually most diffused. Proponents of such a limitation argue that it is proper because the ultimate goal of the antitrust laws is to protect consumers. In fact, however, the goal of the antitrust laws is to protect our system of free enterprise and competition, because our society agrees that consumers benefit most if all markets operate competitively. Given the secretive nature of conspiratorial conduct, comthat provides for automatic trebling of private antitrust damages is working satisfactorily. If not, what are the problems and why are they occurring? Second, does S.2162 respond to these problems by correcting their causes? This involves an assessment of whether S.2162 corrects the perverse incentives in current law. Third, are there any unresolved issues or problems in S.2162? Here I consider whether the Administration's proposal might be improved.

I. Is There a Need for a Change?

The first question is whether there are sound reasons for changing the rule of mandatory trebling. At the outset, it bears mentioning that there should be no objection in principle to changing an important part of the antitrust laws. Antitrust is now generally recognized as a regulatory regime. Therefore, the burden on continuing this intervention in private markets should be continually examined and justified. The antitrust laws -- even those portions enacted in the last century -- do not have canonical status; we should not be averse to change if there are sound reasons for taking such a step. (Indeed, the Statute of Monopolies, the 1623 English statute that was probably the inspiration for the treble damages remedy, was repealed in 1969 after having been on the books for nearly 350 years.)

I appreciate the Committee's invitation to express my views on S. 2162, the Antitrust Remedies Improvements Act of 1986 ("the Act").1/ At your request, my comments are addressed to one important change, that is, the proposed modification of the mandatory treble damage rule in cases involving private parties. The Act would amend section 4 of the Clayton Act to limit recovery of treble damages for injuries sustained by reason of the plaintiff having been overcharged or underpaid by an antitrust violation; actual damages would be available in all other instances.

In deciding whether to adopt this proposal, three questions need to be answered. The first is whether the current system

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1/ The Act has several features: (1) an amendment to section 4 of the Clayton Act to provide for the recovery of treble damages only for injuries sustained by reason of the plaintiff having been overcharged or underpaid by an antitrust violation; actual damages would be available in all other instances; (2) a provision for automatic prejudgment interest in actual damages cases under section 4 of the Clayton Act; (3) amendments to section 4A of the Clayton Act to permit the United States to recover treble damages when it is injured by reason of having been overcharged or underpaid by an antitrust violation and to permit the United States to obtain prejudgment interest in situations when actual damages are appropriate; (4) an amendment to section 4C of the Clayton Act to conform the provisions governing prejudgment interest awards in parens patriae cases under section 4C to the provisions governing such awards under sections 4 and 4A as amended by the Act; (5) an amendment allowing substantially prevailing defendants to be awarded attorneys' fees upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith; and (6) an addition to the Clayton Act relating to claim reduction.

STATEMENT

OF

ERNEST GELLHORN*/

Before the

Committee on the Judiciary
United States Senate

HEARING ON

S. 2162

THE ANTITRUST REMEDIES IMPROVEMENTS ACT OF 1986

May 7, 1986

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*/ Dean & Galen J. Roush Professor of Law, Case Western Reserve University School of Law (until June 30, 1986); Jones, Day, Reavis & Pogue (since April 1, 1986)

The administration proposal, likewise, does not directly address the question of burden of proof, and in antitrust that is often switched by whether or not an activity has been identified as being subject to a per se rule.

I think it would be appropriate in the legislative history to make clear that the burden of proof should always be on the plaintiff in a private treble damage case.

Finally, I would suggest that these are questions better handled by a judge than a jury, and if the opportunity availed itself, that the language of the statute be rewritten to make clear that the determination of treble damages ought to be a judge's determination.

Thank you very much for this opportunity to present my views to you today.

[The prepared statement and responses to questions follow:]

A corollary benefit of the administration proposal is that it would eliminate from the current Federal court caseload those private treble damage cases that are there because of the skewed incentives and misuse the private treble damage recovery to deter competitive conduct.

The final question I want to address briefly is: Is the administration proposal workable; can it be administered, or does it raise more problems that it solves?

First of all, I think the administration is to be commended for avoiding the pitfalls of prior proposals. It was, for example, suggested in an earlier proposal from the administration in 1983 that private treble damages be limited to per se violations.

The difficulty with that proposal was that what is a per se violation today may not be a per se violation tomorrow. We are constantly learning more about the meaning and appropriate utilization of the antitrust laws. That proposal would have meant that defendants would not necessarily know the kind of conduct that was being deterred, and we would be sending the wrong signals.

The essence of the concern of the antitrust laws the need to protect consumer welfare. Anticompetitive conduct harms by forcing them to pay more for the products than a competitive marketplace would provide. That is, it seems to me, the essential, valid point of the administration proposal.

It focuses on the effect on competition of anticompetitive conduct through means measurable in the individual case. In addition, its tests of overcharge or underpayment are traditional measures of damages which have been relied on for years by courts in determining the initial single damage basis of an antitrust violation.

On the other hand, I would suggest that in assessing of the administration proposal, care be taken to respond to its potential open-ended aspect which says that any overcharge or underpayment might be the basis of a treble damage action.

As pointed out by Mr. Susman, this could be read—indeed, he would encourage it as being read—to allow a customer assertedly injured by a tie-in provision or exclusive territory or resale price program to sue for treble damages.

Such a result would be unfortunate. It is the competitor conduct which ought not to be deterred. It is an efficiency-enhancing technique which the Supreme Court applauded in 1977. To limit, in other words, the administration proposal to serious anticompetitive cartel conduct, I would suggest that the language in title II be rewritten to limit antitrust treble damages to "overcharges of persons injured by an agreement among competitors to fix prices or to allocate customers, territories or markets."

In offering this suggestion, I do not mean to indicate that the administration proposal is unworkable. I think it is highly workable. I think it can be improved modestly, but if it were a choice between the administration proposal and the modest improvement I am suggesting, I would obviously opt for the administration proposal.

It does not mean that there are no questions. A court would still have to determine whether or not an overcharge occurred or underpayment had been imposed.

ficient, more effective dealer system. The antitrust laws are being used to stop that kind of change in the distribution system. Because of the trevel damage provision, the dealter has an incentive to sue under the antitrust laws rather than under the contract or tort law, where the appropriate remedy may be available. These are, in other words, hold-up suits that skew the incentives of the parties.

In addition, a second effect of the treble damage system is to distort competitive conduct. Manufacturers are hesitant to appoint dealers where they may not be able to terminate them. Or they are unwilling to terminate dealers when they should be terminating them even though their actions are not effective in serving customers and in protecting the manufacturer's interest.

We have, in other words, a skewing of incentives to use antitrust as an anti-competitive tool on the one hand, and a distortion of competitor conduct on the other hand because of over-deterrence.

The second question that should be reviewed is: Does the administration proposal respond to these problems? I would suggest that it does so in a balanced, sensible and reasonable way. It provides in all antitrust cases that actual—that is, single damages—can be recovered.

It provides for attorneys' fees; pre-judgment interest—a significant area currently missing for all private cases—treble damages for the United States in the appropriate circumstance; and, finally, the modification of treble damages so that they are available only in the overcharge/underpayment situation.

In contrast to the testimony offered by Mr. Susman earlier this morning, I would suggest that the administration proposal will allow treble damages for group boycotts and market divisions. In point of fact, the administration recommendation is designed to do so because those are classic antitrust violations which are likely to result in either overcharges or underpayments.

But the most important element of the administration proposal, and the reason it warrants this committee's serious consideration and support, is that it is designed to limit the antitrust penalty of treble damages to those secret conspiracies that are hidden from public view for which an incentive is necessary to encourage compliance with the antitrust laws. It provides treble damages for essentially cartel conduct, for that conduct unknown to the participants in the marketplace which will result either in a monopoly overcharge or predatory pricing below cost.

What the administration proposal also does, and this is its other major benefit, is that it avoids the over-deterrence embedded in current law. Overt conduct, conduct known to others in the marketplace—for example, tie-in arrangements, different prices under resale price maintenance, vertical arrangements included in contracts publicly disclosed—would not be the basis for private treble damage cases because of the fact that there would be no overcharge.

These latter contracts do not hurt competition or consumers. Indeed, they are used by manufacturers with their distributors in order to provide the kind of service the customers are seeking, and generally should be favored as outlined by the Supreme Court in 1977 in the *GTE Sylvania* case.

Senator GRASSLEY [presiding]. Thank you, Judge Bell.

I would now like to call, before questioning the panel, Ernest Gellhorn, of Washington, DC. Would you proceed with your testimony?

Mr. GELLHORN. Thank you very much, Mr. Chairman, Senators. I would like to submit my prepared statement and summarize my views extemporaneously for a few minutes for the committee.

Senator GRASSLEY. As is the practice, your entire statement will be included in the record as if read.

STATEMENT OF ERNEST GELLHORN

Mr. GELLHORN. Three questions need to be addressed in considering the administration proposal, S. 2162. The first is whether there is a need for a change, and here I most say that at the outset I take a position quite distinctive from that offered by Mr. Susman. About the only thing I agreed with him on is that he no longer reads the cases; indeed, I read the cases and economic evidence quite differently than he would and therefore come to very different conclusions.

I start from the proposition offered by Judge Bell that the antitrust laws are not immutable; that, indeed, we ought periodically to reconsider them. The antitrust laws constitute a regulatory regime as they intervene in the marketplace to alter private business conduct. The question therefore is, do they do it at the right time, at the right place, and in the right fashion.

The antitrust treble damage provision has its historical antecedents back to 1623, in the English Statute of Monopolies. It is particularly interesting to note that the English, after a study 17 years ago, abandoned that statute and have eliminated automatic treble damages.

The reason, it seems to me, for considering a change at this point is both theoretical and practical. We have had substantial scholarly studies over the last 15 to 20 years of the private treble damage system. They cover both theory and fact and include the NERA study in 1979 and the Georgetown study in 1985.

Without exception these examinations conclude that the current system is not working well. They suggest that the current system is not working, and the current system is not working for two reasons. First of all, it skews the incentives. It encourages, by providing three-fold the damages plus attorneys' fees, an opportunity for plaintiffs to recover more than they suffered in terms of injuries and thus to receive a windfall.

Over half of the current antitrust suits brought by private plaintiffs, as demonstrated by the 1985 Georgetown study, are brought by competitors. A close examination of those cases shows that a majority are dealer termination cases.

Twenty years ago, I did a study of dealer termination cases and reported my results in the Duke Law Journal in 1967. It was clear to me then, and is clear in terms of reading cases since then, that dealer termination suits are, in essence, contract disputes masquerading under antitrust treble damages.

These are devices by which dealers challenge that the manufacturer who is terminating them in order to obtain a better, more ef-

"2. Under existing antitrust laws, the United States never can recover more than actual damages. This legislation would provide the United States, as an overcharged purchaser, with a treble-damage remedy against price fixers and bid riggers.

What are the policy justifications for this legislative proposal? To what extent do you foresee any increase in the deterrent factor by this proposed amendment in the antitrust laws?"

For the reasons stated in my answer to the Chairman's second question, providing the United States with an additional multiple damages remedy cannot be expected to enhance deterrence.

"3. Title III of S. 2162 amends antitrust law provisions for the award of attorneys' fees, which are an integral part of private enforcement of the antitrust laws.

What misuses, if any, of this process support the legislative proposal to award costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith?"

While I am supportive of efforts to deter this type of conduct by parties to litigation, including both plaintiffs and defendants, I have made no independent study of the specific instances of misuse that give rise to the Administration's proposal.

financed in part with federal funds. Instead, the government endorsed the position that the States victimized by bid-rigging on such highway projects were better positioned to recover damages from the offenders. In short, where the government wishes to deter antitrust violations that victimize it, a variety of potent remedies are available under existing statutes.

A second reason why trebling government damages is unlikely to enhance deterrence relates to the unique regulatory structure for federal procurement. Government purchases are made in accordance with a variety of statutes and regulations designed to assure procurement at minimum cost. Like the regulatory schemes that govern other sectors of the economy, these mechanisms are a substitute for the competitive forces of the free market. For many government purchasing requirements, the operation of such procurement regulations can prevent the direct application of traditional antitrust principles and the use of ordinary market mechanisms. In those areas where antitrust is applicable, however, existing government remedies appear to be adequate.

Both the Attorney General and the Assistant Attorney General in charge of the Antitrust Division have announced their intention to prosecute vigorously antitrust violations that increase the cost of government procurement. As they have recognized, however, a large portion of government purchases occur under regulatory rules that differ so substantially from private sector competition that application of traditional antitrust principles is simply infeasible. Increasing antitrust damages will do nothing to enhance deterrence where the antitrust laws do not apply. The Committee may wish to monitor other ongoing efforts in Congress to consider whether the rules that govern federal procurement might be adjusted in order to reduce costs and enhance efficiency.

II. Questions submitted by Senator Specter

"1. A working group formed by the Domestic Policy Council and the Economic Policy Council of the Cabinet has completed an extensive review of the antitrust laws and competition in the United States.

What were the working group's findings which support the administration's proposal to provide for the recovery of treble damages only for those injuries sustained by reason of the plaintiff 'having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages?' What were the working group's findings which support the recovery of actual damages in all other cases?"

Because the working group referred to in the question was not primarily a fact-finding body, it is difficult to speak in terms of specific "findings". However, the policy considerations relevant to the merits of this particular proposal were discussed in my answer to the Chairman's first question. The facts underlying the required policy judgments include (1) the frequency of "strike suits" by competitors (2) the frequency of instances in which exclusionary or predatory conduct requires treble damages for adequate deterrence, (3) the ability of judges to recognize "strike suits" quickly, and (4) the adequacy of government antitrust enforcement in instances of exclusionary or predatory conduct warranting deterrence.

While findings on these questions would permit a more precise judgment concerning the wisdom of the Administration's specific proposal, the fundamental idea of adjusting damage penalties to fit the nature of the illegal conduct requires only a belief in the maxim, "Let the punishment fit the crime."

plaintiff's accusations has not been finally determined. While this and similar examples are not fanciful, it is difficult to determine their frequency and their importance.

It could be argued that criminal enforcement by the Justice Department will be sufficient to deter the most harmful exclusionary conduct, and that multiple damage suits are simply not needed for this purpose. It is interesting to note, however, that a criminal investigation into the circumstances giving rise to *Laker Airways* was discontinued by the government for foreign policy reasons. This demonstrates that there are at least some instances in which the criminal enforcement process cannot be brought to bear on alleged exclusionary conduct. Thus, it is difficult to quantify the risks of eliminating the deterrent effect of treble damages for anticompetitive conduct directed against competitors, as the Administration proposal apparently would do.

The other side of the equation -- the benefit from eliminating competitor strike suits -- is equally difficult to quantify. There is considerable room for disagreement regarding the frequency and importance of such suits. If judges can accurately distinguish between strike suits and meritorious suits, then elimination of treble damages would be an unnecessary step. If judges cannot expeditiously identify and put a stop to strike suits, however, eliminating treble damages for competitor suits could provide an important benefit to the antitrust enforcement process, and to competition in the markets governed by antitrust rules.

The Committee might also wish to explore whether it is necessary to preclude multiple damages for all competitor suits in order to prevent the instances of abuse that may occur. It might be possible to write a statutory rule that would permit treble damages only in those competitor suits where the justifications for such damages are present. Thus, for example, a provision permitting or requiring trebling where the illegal conduct was not known to the victim, and where the conduct could not have been discovered by the victim's reasonable efforts, may achieve a better accommodation of the interests in deterring serious violations while minimizing the administrative and competitive costs of strike suits.

"2. Do you agree with the Administration that the Federal government should recover treble damages in civil suits?"

No. The government consumes enormous quantities of goods and services. Because the costs of government purchasing are borne ultimately by the taxpayer, it is vital that they be held to a minimum, particularly in light of the urgent need to control the budget deficit. It has never been contended, so far as I am aware, that the government's procurement budget is inflated by undeterred antitrust violations on the part of those who supply goods and services to the government.

There are several reasons why trebling government damages in civil suits is unlikely to enhance deterrence. First, a variety of criminal penalties and damage remedies, in addition to the single damage remedy provided by the Clayton Act, are already available as weapons against antitrust violations that victimize the government. These include the Sherman Act (criminal penalties), the False Claims Act (criminal penalties and double damages), debarment procedures under the regulations of the various procuring agencies, and additional remedies under other statutes (mail and wire fraud, for example). The Justice Department compiled a commendable record of prosecuting bid-rigging conspiracies in the road-building industry using these remedies.

Throughout the road-building investigation, which was the most productive in the Antitrust Division's history by all objective measures, few if any treble damage suits were brought by the federal government, even though the affected projects were

RESPONSE TO WRITTEN QUESTIONS

I. Questions submitted by Chairman Thurmond

> "1. Do you believe that the Administration's proposal to provide treble damages in overcharge situations but actual damages to competitors would deter the worst antitrust violations while encouraging aggressive competition by reducing harassment suits?"

I agree that the Administration's proposal would retain treble damages for the type of antitrust violation that deserves maximum deterrence: minimum price-fixing conspiracies by competing sellers.[1] The proposal would probably reduce the incentives of firms to bring suits to harass competitors rather than to protect their rights under the antitrust laws. By eliminating treble damages for competitor suits, the proposal would also reduce the *in terrorem* effect of antitrust suits brought by competitors for purposes of harassment. The Committee should also consider the possibility, however, that the proposal might reduce deterrence of some antitrust violations directed by one competitor against another. This possibility raises several difficult questions.

The issue posed by the Administration's approach is whether the benefits of eliminating "strike suits" by competitors is outweighed by the cost of reducing deterrence of predatory or exclusionary conduct against competitors. In order to evaluate these benefits and costs, it is necessary to make important assumptions about the nature and frequency of two types of cases -- the unjustified competitor "strike suit", and instances of predatory or exclusionary conduct that might not be deterred adequately without treble damages.

At least two factors tend to be present in situations where treble damages seem justified: the victim is unaware of the illegal conduct, and the conduct has little or no procompetitive potential or justification. For covert violations, multiple damages can be justified as a way to obtain appropriate levels of deterrence. Multiple damages increase the perceived risks to the violator of committing the offense, thus offsetting the low probability of detection and punishment. On the other hand, some antitrust violations (minimum price fixing by direct competitors, for example) are so harmful that they can properly be subjected to treble damages even where the victim is well aware of the violation.

The possibility that treble damages may be justified for some types of exclusionary conduct cannot be ruled out. If, for example, a dominant firm or a dominant group of firms surreptitiously encouraged (or coerced) creditors of an emerging competitor to deny vital financing to the new entrant, the rationale for multiple damages may be present: because the conduct is concealed from the victim, the deterrence rationale for trebling is present. Because the conduct might also be seriously anticompetitive, multiple damages might be justified on that basis as well, even for overt conduct.

This hypothetical example resembles an allegation made in a recent antitrust suit. Laker Airways, Ltd. v. Pan American World Airways, 559 F.Supp. 1124, 1127 (D.D.C. 1983)(alleged conspiracy by incumbent air carriers to pressure financial supporters of new cut-rate airline to deny financing). The validity of the trebling in areas where the punitive and deterrent effects of this remedy have given rise to potential conflicts with other policies. These include the Export Trading Company Act of 1982[14], the Local Government Antitrust Act of 1984[15], and the National Cooperative Research Act[16].

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[1] The Administration's proposal would also provide for trebling of damages caused by prices reduced below a competitive level by conspiracies among competing purchasers. This is in accord with the economic and legal similarities between the two varieties of conspiratorial conduct. See Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

In conclusion, simple justice supports the idea of fine-tuning the severity of antitrust remedies to fit the nature of the specific conduct and the purposes of the law. Both the judicial rules of substantive antitrust law and the enforcement policies of the Department of Justice have long reflected that antitrust violations differ significantly in the nature and degree of the penalties they deserve. There is a sound basis for the view that the private antitrust remedies should also reflect these differences. S. 2162 provides a good starting point for discussion, and I urge the Committee to explore Title II thoroughly, along with any suggested alternative approaches.

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[14] 15 U.S.C. §§ 4001-4021.

[15] 15 U.S.C. §§ 34-36.

[16] 15 U.S.C. §§ 4301-4305.

is also mandatory. Thus, any party who has suffered injury should have a sufficient incentive to seek redress.

A more substantial basis for the trebling of antitrust damages can be found where the nature of the violation gives rise to the possibility that victims will not realize that they are being harmed by the illegal conduct. This problem is most serious for secret bid-rigging conspiracies and similar violations. For conduct of this nature effective deterrence may require increased damages to compensate for the low probability of detection and punishment.

S. 2162 appears to address this concern by retaining treble damages where the victim has been forced by the violation to pay overcharges or underpayments.[13] This approach permits treble damages for the class of violations for which the problems of detection are the most severe. There may be other types of violations where such problems are equally severe. Perhaps claimants could be permitted to demonstrate this in other cases, thereby entitling them to treble damages. This would introduce a new and important issue into antitrust cases, and would not have the administrative simplicity of a statutory rule like that contained in S. 2162.

The idea of departing from the rule of mandatory trebling of private antitrust damages is not new. Several recent statutory reforms have made significant use of departures from mandatory the legality of most such conduct is regarded as ambiguous by both the courts and the Department of Justice.[12]

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[13] This alternative was suggested in Note, *Rethinking Antitrust Damages*, 33 Stan.L.Rev. 329 (1981).

This situation is probably unique in our legal system. Under common law principles a party injured by negligence, for example, can recover only actual damages. Punitive or exemplary damages are available only for intentional or otherwise reprehensible conduct.

Mandatory treble damages have a rationale, however, that is not typical of other fields of law. This unique explanation for multiple antitrust damages is referred to as a "private attorney general" purpose: In theory, treble damages act as a subsidy to private parties who might not otherwise pursue claims against wrongdoers.

The validity of the "private attorney general" rationale seems to depend on the nature of the violation involved. If injured parties realize the source of harm, it is unclear why they cannot be expected to bring suit to recover for their injuries, even if only single damages were available. It can be argued that an injured party will not seek redress when the size of the claim is insufficient to justify the necessary legal fees. In antitrust law, however, recovery of a successful claimant's attorney's fee

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[12] 15 U.S.C. § 15. It is interesting to note that, despite the mandatory language of the statute, courts have occasionally refused to permit treble damages to be awarded against the estate of a deceased antitrust violator. This seems to support the view that some courts are uncomfortable with the mandatory nature of the remedy. ABA Antitrust Section, Antitrust Law Developments 483 (2d ed. 1984).

Response by
Ernest Gellhorn

Questions From Senator Arlen Specter

1. A working group formed by the Domestic Policy Council and the Economic Policy Council of the Cabinet has completed an extensive review of the antitrust laws and competition in the United States.

   What were the working group's findings which support the administration's proposal to provide for the recovery of treble damages only for those injuries sustained by reason of the plaintiff "having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages?" What were the working group's findings which support the recovery of actual damages i n all other cases?

   Response:

   The Working Group examined studies by others and reviewed reform proposals. It was not a fact finding body. The empirical basis and policy justifications for treble damage recommendations in S. 2162 are discussed below.

2. Under existing antitrust laws, the United States never can recover more than actual damages. This legislation would provide the United States, as an overcharged purchaser, with a treble-damage remedy against price fixers and bid riggers.

   What are the policy justifications for this legislative proposal? To what extent do you foresee any increase in the deterrent factor by this proposed amendment in the antitrust laws?

   Response:

   (a) There are several policy justifications for allowing the United States to recover treble damages when it is overcharged for purchases. It would increase deterrence of conduct which deserves strong condemnation. The focus here is on covert conduct that is difficult to detect and prosecute; an increase in the possible penalty seems justified. By giving the government the same remedies as private parties when the government is a purchaser, the antitrust laws will achieve a symmetry and rationality they have not previously had. This will standardize the incentives and make it as costly for a defendant to fix prices against the government as against other purchasers.

   (b) By increasing the penalty for serious antitrust violations against the government as purchaser, the Congress would be correcting skewed incentives in the laws that favor antitrust enforcement by private purchasers. This may not have been a serious omission when the government was not a significant purchaser; that is, of course, no longer the case and this correction is therefore desirable.

3. Title III of S.2162 amends antitrust law provisions for the award of attorneys' fees, which are an integral part of private enforcement of the antitrust laws.

   What misuses, if any, of this process support the legislative proposal to award costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith?

should not obscure the fact that whether to treble is not the only significant question. The often intractable yet vital issues of the proper substantive standards, in addition to standing and antitrust injury questions, also deserve attention and correction. While focusing on remedies is surely important, we need to continue the debate about more fundamental issues.

in price squeeze cases, e.g., when a competitor, who also purchases an input from the defendant, complains about "discriminatory" price increases.

Perhaps these examples are aberrational. It is hard to imagine that S.2162's theoretical framework, with its emphasis on whether the violation was concealed, was designed to support treble damages in such instances. This question may be an inevitable result of the difficulties of statutory draftsmanship or a necessary compromise. On the other hand, a conduct-based alternative, which avoids reliance on the _per se_/rule of reason distinction, is at least as workable and is more likely to solve the problems that need correction.

The Administration's proposal also leaves several important questions unanswered. It is not clear how the "overcharged or underpaid" issue will be decided. For example, it should be made clear that the plaintiff bears the burden of proof on the "overcharged or underpaid" issue in _per se_ as well as rule of reason cases. The same need for clarification applies to the division of responsibility between judge and jury. If S.2162 intends that the judge should decide whether the plaintiff has been overcharged or underpaid -- and this seems preferable -- then that should be expressly indicated.

Despite these questions, I want to emphasize my strong conclusion that the Administration's proposal is a welcome contribution and worth support. Even so the remedies reform

The Administration's current proposal seems far more workable. Although disputes will surely arise about how the "overcharged or underpaid" language is to be interpreted, the proposal would eliminate treble damages in all instances in which the plaintiff is not a customer or supplier of one of the defendants. Treble damages will not be available in most suits brought by competitors. Although some private antitrust litigation will be made more complex (as plaintiffs try to find a basis to link one of their suppliers or customers to a conspiracy), there should be a substantial number of cases in which the potential availability of treble damages is clear at the outset.

The proposed language is an attempt to emphasize the substance of the conduct appropriate for treble damages rather than the label. An even more precise formulation seems possible. For example, I would suggest consideration of language to limit treble damages to overcharges of persons injured by an agreement among competitors to fix prices or to allocate customers, territories, or markets. Under the current proposal, treble damages would apparently be available in secondary line cases under the Robinson-Patman Act, customer claims for tying, and customer attacks on vertical nonprice restrictions; in all of these examples, a customer would be seeking to recover overcharges. It is even possible that treble damages would be available for a portion of the damages plaintiffs of compensation. By allowing all antitrust plaintiffs the opportunity to sue for single damages, no antitrust violation would be immune from paying actual damages. The proposal would also help to relieve the federal courts of some of the burdens of federal antitrust suits.

III. *An Assessment*

A fair assessment of S.2162's treble damage provisions shows, in my opinion, that they deserve wide support. Here, however, I want to consider a number of questions. A major concern with most reform proposals in the area of treble damages has been their administrability. For example, the Administration's 1983 proposal would have permitted trebling only for damages attributable to "agreements or practices the nature or necessary effect of which is so plainly anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use." It sought to limit treble damages to *per se* violations, but necessarily relied upon an ambiguous legal test. Another particularly troublesome problem is that there would have been little predictability -- for it is often not clear when the *per se* rule applies. *See, e.g.*, *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948 (1984). The 1983 proposal would have directed more energy to fighting about the appropriate label, an unfruitful task.

is (as the Administration states) a real need to provide the victims the "incentive to discover and challenge clearly harmful behavior." Also, retaining treble damages for price fixing and bid rigging ensures that the penalty, discounted by the probability of detection and conviction, more closely approximates the social cost of the violation. Thus, the Administration's proposal retaining existing incentives for potential victims of overcharges to seek treble damages maintains the harsh disincentives for potential violators.

On the other hand, the Administration's proposal eliminates the availability of treble damages in suits by competitors, at least when the competitors' damages do not involve having been overcharged or underpaid. The most important reason for this approach is to address the problem created by competitor suits brought to frustrate competition; "[l]imiting recovery to full compensation addresses the overdeterrence problem created by such cases, but does not deprive a plaintiff with a just cause of a complete recovery." 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253, at S-6 (Feb. 20, 1986) (quoting Text of Administration's Proposals on Antitrust Reform) (Special Supplement on the Reagan Administration's Antitrust Reform Package).

The Administration's proposal, therefore, seems a reasonable and balanced effort. The proposal would limit the abuses of mandatory trebling, without depriving injured major question is whether the Administration's proposal moves in the right direction. There have been a variety of alternatives suggested over the years: eliminating a damages multiple altogether, discretionary trebling (in some or all cases), limiting treble damages to "covert" violations, limiting treble damages to specific categories of offenses, and eliminating private enforcement. The Administration's proposal, contrary to what the more impassioned responses suggest, is in fact a balanced effort. The clear intent is to reserve punitive sanctions for price fixing and bid-rigging, but treble damages might be available in other cases where evidence of overcharge or underpayment is persuasive. Supporters of the Administration's proposal have only emphasized that it would retain treble damages for cartel conduct -- there has been little discussion of the other contexts in which trebling would still be available. Perhaps the Administration is reluctant to discuss the fact that its proposal would retain treble damages for tying and certain RPM suits, but an acknowledgement of the actual reach of the proposal might contribute to a broader public awareness of the moderate nature of the Administration's proposal.

In any event, retention of treble damages for cartel conduct is clearly appropriate. These violations are universally acknowledged as the most serious. And, because these violations are the most likely to be kept secret, there are avoided. Another problem with mandatory trebling is its perceived unfairness. Despite exhortations calling us "not [to] forget that violations of the antitrust laws are crimes merely because we are focusing on the civil remedies, . . ."3/ it seems clear that there is a real difference in culpability between a defendant who engages in classic cartel conduct and a defendant who inadvertently violates the antitrust laws by terminating a dealer who has failed to perform service obligations. As written, the law now allows treble damages in both cases. It would be rewritten by S.2162 to restrict trebling to cartel like conduct. The fact that "punitive" sanctions are available under the antitrust laws for conduct that would not warrant punitive damages under traditional common law standards suggests that a rethinking of the current antitrust remedies is in order. In point of fact, it suggests that the burden of proof should be on those who support retaining the current approach.

II. Does the Administration's Proposal Move in the Right Direction?

These problems with the rule of mandatory trebling strongly indicate that the rule should be reconsidered. The second

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3/ Testimony of Robert Abrams on the Antitrust Remedies Improvement Act of 1986 at 8-9 (March 21, 1986).

plaintiff). In the *Matsushita* case, the Supreme Court stated: "We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1360 (1986) (Powell, J.)(quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)). The problem of overdeterrence is particularly acute when dealing with overt behavior. There may be a real need for multiple damages in the context of concealable behavior for in that context multiple damages ensure that the penalty takes account of the probability of apprehension and conviction. The availability of treble damages for open and notorious conduct may well attract too much enforcement, with the resultant inhibiting effect on those businessmen contemplating aggressive competitive strategies.

There are other "problems" with the existing rule of mandatory trebling, aside from the more directly economic ones noted above. There is some evidence to suggest that the existence of treble damages has had a distorting effect on antitrust jurisprudence. The state action cases and decisions such as *Gordon v. New York Stock Exchange Inc.*, 422 U.S. 659 (1975), are notable examples. That is, the punitive effect of three-fold damages has apparently led the Court to strained interpretations of the antitrust laws so that perverse results

extract settlements from defendants who fear treble damage exposure. In Copperweld, the Supreme Court, in eliminating the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries, noted that private state tort suits often masquerade as antitrust actions. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2745 (1984). And, the Georgetown Study suggests (as did the NERA Study) that many antitrust suits primarily involve contract and/or tort issues.2/ For example, Assistant Attorney General Ginsburg has recently emphasized "that more than half of the private suits brought annually are filed by competitors, terminated dealers, suppliers, and former employees - not by consumers. While some are valid, 'most of them are contract claims dressed up with an antitrust count in order to get the treble damages.'" Professors Breit and Elzinga, citing the NERA Study's finding that almost three-fourths of the private antitrust cases brought in the Southern District of New York between 1973 and 1978 involved vertical conduct, commented that many alleged violations "fall predominantly under the category of what the new learning deems efficient offenses. From an

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2/ A prime example is the dealer termination suit where the antitrust action is often a substitute for limited contract or tort relief. See Gellhorn, Limitations on Contract Termination Rights - Franchise Cancellations, 1967 Duke Law Journal 465.

in the Southern District of New York and, more recently, the Georgetown Study's more comprehensive examination of antitrust litigation. I think it is safe to say that we know more about private antitrust litigation than we did in the past.

These recent efforts to learn more about private antitrust litigation and about treble damages specifically are foundational. Until now, the discussion on all fronts has been dominated by anecdotes and sweeping rhetoric. Indeed, the Administration's proposal was greeted by some with such a response. For example, some have suggested that the focus on remedies is simply a covert way of accomplishing other objectives. Surely, some of the impetus for treble damage reform is based on dissatisfaction with both the substantive law (e.g., the *per se* illegality of resale price maintenance) and the standing rules (e.g., the Tenth Circuit's opinion in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473). In addition, some of the support for reform comes from those who question the desirability of any private enforcement. But the presence of "extraneous" motivations should not be allowed to excuse a hard look at the issue. There are, I believe, several very real problems presented by mandatory trebling, and it is to these problems that we should turn.

First, an oft-noted problem is that mandatory trebling encourages plaintiffs to bring meritless, "hold-up" suits to

Proposals for change in the private damage system for antitrust have a lineage that equals the antitrust laws. As early as 1898, a congressman proposed reducing awards to double damages; and in 1908 another congressman proposed eliminating any multiple award. Legislative proposals giving courts discretion to reduce treble damage awards were introduced in 1953, 1955, 1957, 1959, and 1961, but none was voted out of committee. The 1955 Attorney General's Report endorsed a proposal to allow the trial judge discretion to impose double or treble damages. Despite all of this effort, we have not seen a major change in the private damage system for antitrust. Even the Justice Department's 1983 proposal to limit treble damages to per se cases was not taken very seriously.

The situation seems far different today. The Administration's proposal is being given serious attention. There are a number of explanations for this change, but I believe there are two basic reasons for this increased willingness to listen to proposals for reform. First, considerable theoretical work has been done in the area of sanctions in the last two decades, with most of the work in the antitrust area following the publication of several pieces by Professors Elzinga and Breit in the mid-1970's. Also, significant empirical work has been done, with the most notable events being NERA's 1979 study of private antitrust litigation

Senator GRASSLEY. Thank you, Mr. Gellhorn.

Before I go to Senator Simon let me say that Chairman Thurmond advised me that there will be many questions submitted for answers in writing.

Now I would give Mr. Susman an opportunity to react to anything that the other two witnesses said, before we go to Senator Simon.

Mr. SUSMAN. It is hard to disagree with Judge Bell's comment that the punishment ought to fit the crime, and I might be willing to concede that we ought to provide, by statute—do away with mandatory treble damages and provide, by statute, discretionary punitive damages awardable by a jury in an antitrust case—that does not offend me—in any amount. It can be treble, it can be quadruple, it can be ten times.

To allow a jury to award punitive damages or exemplary damages to punish, depending on the kind of conduct—I would go along with Judge Bell on that. I think we would be in agreement, but that is clearly not the administration proposal, which does not fit the punishment to the crime at all.

You can have a rule-of-reason violation where the people are acting secretly, the defendants are acting secretly. They knew darned well that they are violating the law. They are doing what they are doing in the face of a white-horse case. It is egregious conduct, as would be per se conduct. The jury ought to be able to punish that.

I would also point out that if damages should be dependent on the type of the defendant's conduct, the nature of the defendant's conduct, why look, as does the present proposal, at the identity of the plaintiff?

The present proposal allows treble damages to turn on not what the defendants did, but whether the plaintiff is a consumer or a competitor. That should not be the test

I agree with him that we ought to look at the nature of the defendant's conduct, but certainly not at the identity of the plaintiff.

Professor Gellhorn does read cases, but I have looked at his paper and have not found a single one—and I invite him to tell you a single case that he thinks was wrongly decided in the last 5 years and that has been affirmed on appeal.

He relies on a 20-year-old study to tell us how bad things are. That is totally irrelevant. Ten years ago, I was a plaintiffs' antitrust lawyer and I was using cases under his study to bring lawsuits. That is no longer true.

There are no dealer termination cases brought today, except by lawyers who need their heads examined, and most of them never get as far as a jury. So I would like him to address where are the abuses in the system today, not where they were 20 years ago.

He suggests that treble damages ought to turn on whether the conduct is secret or not secret There is nothing in the proposal that suggests that that ought to be the test—the secrecy or nonsecrecy of the conduct.

He suggests that the proposal should be rewritten to make it clear that treble damages are even more narrowly limited to agreements among competitors, horizontal agreements among competitors. That is clearly not the administration's proposal.

Mr. Cannon, on behalf of the administration, spoke at the ABA spring meeting and he said that a purchaser of a tied product in a tying violation would clearly be able to recover treble damages under the administration's interpretation of their proposal.

Now, there is nothing secret to that purchaser about the tying arrangement, so tie-ins certainly are—all I am saying is the same conduct—one plaintiff, when complaining of that conduct, gets treble damages; another plaintiff, when complaining of the very same conduct, gets actual damages. Now, what is the justification for that?

Senator GRASSLEY. Senator Simon.

Senator SIMON. May I, General Bell, since you are here—I do not know whether to call you Judge Bell or General Bell. Which do you prefer?

Judge BELL. Either one.

Senator SIMON. Either one.

Judge BELL. Mister is good.

Senator SIMON. All right. You may not wish to comment on this, but the question is not only what the law is, but what the enforcement is. What kind of enforcement of the antitrust laws are we currently seeing?

Judge BELL. I think it is vigorous in the bid-rigging area. I think there have been more bid-rigging suits brought in the last 3 or 4 years than in the history of the country, and some in price fixing, and I guess that is about the extent of it that I hear about.

I do not know of any big antitrust suits that are going now, or big investigations, even, that I have run across. But it is vigorous in bid rigging and public contracting; there has been a great emphasis on that. I think the Antitrust Division is to be commended for what they have done in that area. I am not certain that it all has been done this administration, but a lot of it has happened during the present administration.

I guess that is about the best answer I can give you on that.

Senator SIMON. Any comments from Mr. Susman or Mr. Gellhorn?

Mr. SUSMAN. I agree with Judge Bell on that. I think about the only thing we are seeing from the Government are these bid-rigging cases, highway construction cases, construction product cases.

To my knowledge, in the last 3 or 4 years, maybe 5 years, there have not been any really large, national-in-scope or even regional-in-scope price-fixing cases. I cannot think of a single plaintiffs' price-fixing class action that has been filed alleging a nationwide class, basically, in the last 6 or 7 years. There is not much activity.

On the private front, insofar as private enforcement is concerned, I mean, really, when clients come to see me who complaint about what they think is an antitrust violation, I say we had better figure a way to make that into a common law tort and get ourselves into State court because we are not going to get beyond a motion to dismiss for summary judgment in Federal court.

Judge BELL. Would you not say, Steve, that antitrust law practice is in a state of depression?

Mr. SUSMAN. Definitely.

Mr. GELLHORN. I would offer a brief footnote to that to suggest that the antiturst law business is in a depression in some firms. On the other hand, there are other firms that are finding substantial antitrust business and anticompetitive conduct is still being vigorously pursued.

My experience in looking at what is going on in both the Federal Trade Commission and in the Antitrust Division is that there continues to be a careful and close evaluation of price fixing, market division, vertical restraints at certain threshold levels, and mergers.

Much of the merger activity is, for example, currently being supervised by the Federal Trade Commission today. It is well known in antitrust circles that the proposed merger in the soft drink industry is in trouble and is undergoing close scrutiny.

What has happened is that the administration since 1982 in the merger area spelled out carefully and with considerable clarity the standards that they are willing to apply, so that an awful lot of discussion, negotiation and interchange goes on between the Antitrust Division and the Federal Trade Commission and private parties in the design and implementation of merger activity.

Likewise, it seems to me that antitrust attorneys continue to give careful advice to their clients to avoid at all costs price-fixing and market allocations; that these continued to be prohibited; that the administration is vigorous in its enforcement in this area; and that private treble damage actions will follow. In any case, I do not think this body needs to be concerned over the size of the law business today.

So I think that it frankly is an overstatement to suggest that antitrust is no longer a significant part of the legal landscape. It has been restricted, however, to serious anticompetitive conduct and a lot of frivolous anticompetitor conduct cases are no longer being brought.

Judge **Bell**. I would dare say if you would call 20 leading law firms and ask them how much antitrust business they have, they have got a great deal less than they had 3 or 4 years ago. I think that would be the way to answer the question.

Senator **Simon**. I thank you. Thank you, Mr. Chairman. I have no further questions.

Senator **Grassley**. Before the panel goes, I notice that Judge Bell associates with good legal people, in the sense of Mr. Lipsky, who is with you. You know, he is an Iowan.

Judge **Bell**. He is an Iowan.

Senator **Grassley**. Obviously, that is the reason that he is so good. [Laughter.]

Judge **Bell**. Thank you, Senator. He is a mighty good man; I will say that.

Senator **Grassley**. Sure, thank you.

I am going to say thank you very much, and remember that I said that questions would come. I will call the next panel now. Thank you very much.

Our next panel is James Halverson, and he is chairman of the section of antitrust law for the American Bar Association, with Shearman & Sterling of New York; and then second, John A. Irvine, of Porter & Clements, and that is from Houston, TX; Monroe Milstein, chairman of Burlington Coat Factory, Burlington, NJ; and Thomas R. Long, general counsel for Westvaco Corp., New York, NY.

So would you gentlemen proceed, Mr. Halverson, and then right down the line the way you were introduced? Thank you very much.

STATEMENT OF A PANEL CONSISTING OF JAMES T. HALVERSON, SHEARMAN & STERLING, NEW YORK, NY, AND CHAIRMAN, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION; JOHN A. IRVINE, PORTER & CLEMENTS, HOUSTON, TX, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE; MONROE G. MILSTEIN, PRESIDENT, BURLINGTON COAT FACTORY WAREHOUSE CORP., BURLINGTON, NJ, ON BEHALF OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.; AND THOMAS R. LONG, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, WESTVACO CORP., NEW YORK, NY, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. **Halverson**. Yes. Thank you, Mr. Chairman. I am here today to speak on behalf of the section of antitrust law of the American Bar Association. I am expressing the section's views and not those of the American Bar Association because we have not had time to present the matter to the House of Delegates, which does not meet until August. Our views have been cleared, using our blanket authority, with the other sections and divisions of the ABA, so that we may present our views as the Section of Antitrust Law of the American Bar Association.

I am going to comment today on titles II and III of the proposed S. 2162. Title IV regarding claim reduction was the subject of earlier hearings and I testified in those hearings, and the views of the section on claim reduction are included in the written report which I have submitted, Senator, and I would ask that my written report be included in the record.

Senator **Grassley**. As a matter of standard procedure, it will be.

Mr. **Halverson**. Thank you.

I would like to make a couple of prefatory remarks before moving into a short summary of our position. In response to Mr. Susman's comments, and in light of my 21 years of antitrust trial experience, which, incidentally, Senator, included three years as director of the bureau of competition at the Federal Trade Commission where I was a Federal prosecutor, my feeling is that there is a very significant need for change.

My present experience is that competitor suits and dealer termination suits, which can quite often work to stifle pro-competitive behavior, have not diminished. I have one pending in Philadelphia, one in Florida, one in the Southern District of New York; I just settled one in the Middle West. As I say, they seem to continue.

I might add one further comment which seemed to me somewhat ironic. Mr. Susman made the claim that over 60 percent of these cases settle. Well, the reason they settle is because they were brought for what I might politely call extortionate reasons in the first place.

They are quite often contract claims on dealer termination, which the treble damage aspect of the antitrust laws encourages be brought in an antitrust form for a treble damage remedy.

Discovery proves that the claim does not have any basis, and that discovery is very costly to society, and the claim is either dismissed out on a motion for summary judgment or settled for a small amount. But the cost to society is the cost of discovery and the court's supervision time and the parties' time and money, and the cost to society is also the time and thought of executives and the deterrence of possibly pro-competitive behavior which may result.

Let me begin by saying that we have recently had a number of piecemeal looks at reform of the treble damage remedy. The National Cooperative Research Act of 1984, the Local Government Antitrust Act of 1984, the Export Trading Company Act of 1982, and the amendments to the Clayton Act of 1982 affecting foreign governments—all of those addressed whether treble damages were appropriate as a deterrent or as an appropriate compensatory means in certain situations.

When you look at the administration's proposal, it does not adopt what I would call the more extreme suggestions by economic analysts and critics, of which would abolish the treble damage remedy altogether.

It does not reject compensation as a legitimate goal of private enforcement. The proposal would eliminate competitors as treble damage plaintiffs, but I think competitors are particularly well placed, if compensated with actual damages, plus interest back to the date of injury, to protect themselves in a situation in which they know and can detect that they are being hurt.

The situation where you are least likely to be able to detect covert behavior is in the horizontal collusion area, and the administration's overcharge or underpayment language would capture that type of conduct and treble damages would still be available, as they should be, for that type of behavior.

The proposal to eliminate competitors as treble damage plaintiffs is consistent with the views of critics who consider suits by rivals to be unnecessary, and indeed undesirable, for reasons summarized in our report: first, because the kind of conduct which a rival is likely to attack is visible conduct, as I have explained, which can be easily detected.

Second, the rival has an incentive to bring a suit to raise the defendant's costs rather than to preserve competition. Remember that a private competitor has very different incentives than a public servant, either in the antitrust division or the Federal Trade Commission, who is looking at the public interest and not the private interest of the private competitor which may be to raise costs of the defendant.

Third, the basis from which a rival's treble damages are calculated, counting lost profits, is a worse proxy than overcharges or underpayments for determining what economists consider to be the economic loss produced by wrongful conduct.

More fundamentally, the administration's proposal is designed to change the system of remedies so it will better achieve the four objectives described in the legislative history and the traditional literature: One, to punish where punishment is appropriate; two, to deter where deterrence is desirable; three, to encourage private enforcement against action where punishment and deterrence are appropriate and desirable; and, four, to compensate the victim of wrongdoing.

The administration's proposal, as I understand it, is based on a series of five assumptions. First, the fundamental assumption is that the utility and illegality of much, if not most, business conduct is, at best, ambiguous. By that, I mean conduct which may appear to be anticompetitive may, in fact, be procompetitive or competitively neutral.

This assumption, in my experience, is sound, and the Supreme Court has recognized that it is sound because it is eroding dramatically the bright line test between the per se rule and the rule of reason rule. That has happened in the *Broadcast Music* case in 1979, the *Monsanto* case in 1984, the famous *Sylvania* case in 1977, *Northwest Wholesale Stationers,* in 1985, *Jefferson Parish* in 1984.

The per se rules are being abandoned in favor of rules which create more ambiguity, and hence create the possibility of deterring procompetitive or competitively neutral conduct in situations which are treated in a rule of reason context.

The second assumption is that punishment is not appropriate in the case of conduct which falls into the gray area of rule of reason. As I have said, this assumption seems sound.

Under tort law, generally, punitive damages are not awarded unless the defendant has knowingly engaged in wrongful conduct, and if you are in a gray area like the rule of reason area, the fact of knowingly engaging in wrongful conduct is quite often a very difficult thing to determine.

The third assumption is that treble damages, if applied to conduct that falls into the gray area, may create perverse incentives both with respect to business conduct and with respect to the prosecution of private antitrust actions.

Two of the most powerful reasons for treble damages which have been advanced are that they deter conduct by making it potentially very expensive and they serve as an incentive for detecting and prosecuting that conduct.

If one assumes that some of the conduct in the gray area is conduct which is procompetitive or neutral, then the threat of treble damages has to operate in some circumstances to deter business from engaging in that conduct, and in my experience it has so operated.

The fourth assumption is that competitors are more likely than persons who have been overcharged or underpaid to bring private treble damage actions attacking conduct which is procompetitive or neutral.

There is not a lot of statistical evidence on this, but my experience is that competitors whose oxes are gored will bring a case, and that case should be for actual damages, plus interest. It should not be for treble damages because we are, in almost all cases, talking about rule of reason situations.

The fifth and final assumption is that eliminating competitors from treble damages will not materially detract from the deterrent functions which treble damages have traditionally been thought to serve. Again, the proposed change is logically supportable. The change would leave overcharged buyers or underpaid suppliers as potential treble damage plaintiffs and, as I say, that would typically encompass the hard-to-detect conspiracy among competitors.

It may be argued that the change does not go far enough. I have indicated in my statement some situations where I think it may not; I will leave that out and turn to prejudgment interest.

The treble damage limitation is accompanied by a proposal to award prejudgment interest to injured persons other than treble damage plaintiffs. This is consistent with the longstanding objective to fully compensate the victim of an antitrust violation even if that antitrust violation was unintentional. The proposed statutory scheme would produce that result.

The treble damage remedy would provide full compensation to injured buyers and suppliers in the overcharge or underpayment situation. Prejudgment interest would provide full compensation to others, including injured competitors who could establish that they had legitimate claims and prevail in court. Under the present system, we do not have prejudgment interest.

As the proposal now stands, we do have some problem with the prejudgment interest standard because the bill states that "it would be beginning on the earliest date for which injury can be established."

If I may just pose a hypothetical, if I were injured in the 4-year period prior to the filing of the complaint, which is the statutory period for damages—$100,000 the first year, $200,000 the second year, $300,000 the third year, and $400,000 the fourth year—my total damages would be $1 million.

But my interest should not run on $1 million from the first day of injury. That probably can be easily corrected by a change in language. Interest should run on $100,000 the first year, $300,000 the second year, 100 plus 200, and so on, and the $1 million damages would only be accumulated in the fourth year of injury.

Under the language of the proposal, prejudgment interest on damages that are trebled may be recovered if the court finds the defendant engaged in dilatory or bad-faith conduct during the litigation.

If this is intended to go beyond the present language of section 4 of the Clayton Act which allows the court to award prejudgment interest on damages that are trebled only for the period of delay caused by the defendant's dilatory or bad-faith conduct during the litigation, then the Antitrust Section would oppose it.

But I do not think it is intended. I think it is intended to encompass the present section 4 language with respect to cases in which damages are trebled.

Finally, the section and I support the Federal Government treble damage remedy. Treble damages should be made available to the Federal Government, and we have no trouble with that.

On attorneys' fees, however, the section has a problem with the standard "frivolous, unreasonable, without foundation, or in bad faith." The problem arises from our comparison of that standard to what has been used in Federal rule 11 situations involving imposition of sanctions under rule 11 for bringing cases that are frivolous—I am using the case law now—frivolous, legally unreasonable, without fact foundation, or in subjective bad faith.

If the administration is intending to go beyond rule 11, we see no necessity for doing so. In the *Zaldivar* case which is cited in my statement, and in the *Eastway Construction* case, one in the ninth circuit and one in the second circuit, we already have precedent for rule 11 to allow imposition of sanctions for any complaint which is frivolous, legally unreasonable, without factual foundation, or in subjective bad faith.

I would just conclude my statement by saying, Senator, that I and the antitrust section overwhelmingly support the administration's proposal. We think that it is an ingenious one, in that it captures the right kinds of conduct for trebling and it detrebles with respect to the right types of conduct.

Thank you.

[The prepared statement and responses to questions follow:]

STATEMENT OF JAMES T. HALVERSON
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
REGARDING S. 2162
THE ANTITRUST REMEDIES IMPROVEMENTS ACT OF 1986

MAY 7, 1986

Mr. Chairman and members of the Committee, my name is James T. Halverson and I am the Chairman of the Section of Antitrust Law of the American Bar Association. I am speaking today on behalf of the Section of Antitrust Law, and my remarks reflect only the Section's views. They have not been approved by the House of Delegates or the Board of Governors of the ABA, and should not be construed to be the position of the ABA. The Report has received blanket authority from the other Sections and Divisions of the ABA, however, to be presented as the views of the Section of Antitrust Law.

My comments today will cover Titles II and III of the proposed bill. Title IV, regarding Claim Reduction, was the subject of earlier hearings. The views of the Section on claim reduction are included in its report, however, which constitutes my written statement for the record.

I. Introduction[1]

Section 4 of the Clayton Act currently provides for the award of treble damages, plus a reasonable attorney's fee, to any plaintiff, except the federal and foreign governments, who is injured in its business or property by anything that is forbidden in the antitrust laws. The statutory scheme does not provide for recovery of prejudgment interest by the plaintiff except in extraordinary circumstances of delay caused by the defendant. On the other hand, the statute does not afford a prevailing antitrust defendant any remedies under any circumstances. Furthermore, as the statutory scheme has been interpreted, a losing defendant in a multi-defendant case can be liable for treble the amount of the plaintiff's total damages caused by all defendants, less only the amount paid to plaintiff by other defendants.

The Administration proposes five fundamental changes in this statutory scheme. First, the Administration would limit the recovery of treble damages to persons who are "overcharged or underpaid by any person subject to liability under the antitrust laws." Second, the Administration would permit other persons injured "by anything forbidden in the antitrust laws" to recover actual damages plus interest at whatever rate the court considers fair to fully compensate the person for the injury; interest would run during the period "beginning on the earliest date for which injury can be established and ending on the date of judgment." Third, the Administration would give the federal government the same remedies as private parties. Fourth, the Administration would award attorney's fees to a "substantially prevailing defendant" upon a finding that the antitrust plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith." Fifth, the Administration would reduce the claim of any plaintiff releasing any person from liability or potential liability by the greatest of (1) any amount stipulated for that purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released (or treble those damages to the extent the claim is for treble damages) plus any interest on those damages.

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[1] These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

II. Background

The Administration's proposals are made in the following circumstances:

A. Serious questions have been raised about the treble damage remedy in its current form, and those questions were not considered when the remedy was enacted into law.

Section 4 of the Clayton Act, which contains the current automatic treble damage remedy, was originally enacted in 1890 as Section 7 of the Sherman Act. There was little recorded debate about it. The legislative history that does exist suggests that its purposes were threefold: first, to compensate the antitrust victim; second, to punish the antitrust offender; and third, to encourage private enforcement of the Sherman Act.

Although not elaborated in the legislative history, the latter two goals were arguably multi-faceted. Punishment as a goal had two elements: retribution to the offender and deterrence against future violations by the offender and others similarly situated. The private enforcement goal also had two elements: one was to provide an incentive to sue and the other was to give the victim the means to do so (i.e., to attract counsel).

The treble damage provision of the Sherman Act was extended through Section 4 of the Clayton Act to other antitrust laws in 1914. Again, the legislative history is sparse, but what little there is indicates that the goals remained unchallenged and that there was no debate about whether or to what extent automatic trebling met those goals. It was not until the early 1970s that the treble damage remedy was seriously questioned and serious alternative proposals did not surface until the early 1980s.

B. Many of the criticisms of the treble damage remedy reflect concern that a fundamental goal of the antitrust laws is to improve the efficiency with which resources are allocated and that the treble damage remedy is not the most efficient way to achieve that goal.

Economic analysts have criticized the remedy on six grounds. First, most reject compensation as a legitimate goal of private enforcement for various reasons. Some view the higher prices customers pay when there is monopolistic market distortion simply as a resource transfer which does not reduce society's wealth; they conclude that there is no loss of social consequence which should be compensated. Others see societal loss in monopolistic market distortion, but view that loss as the joint responsibility of buyers and sellers and therefore conclude that there is no real "victim" to be compensated. Still others see a societal loss for which someone can and should be blamed, but conclude that the penalty should be based on the amount of that loss, which may or may not be the same as the gain to the violator or the loss to the plaintiff (especially if the plaintiff's damage is not measured by the amount of overcharge or underpayment).

Second, economic analysts argue that to achieve deterrence the amount of the penalty should account for the likelihood of concealment. They argue that the penalty should therefore be increased by an amount sufficient to offset the probability that the conduct will remain undetected. As a rule of general application, the treble damage remedy may overdeter non-concealed conduct and underdeter conduct which is hard to detect.

Third, economic analysts argue that the ability of an enforcement system to deter illegal conduct is affected by both the likelihood of prosecution and the size of the penalty, and an optimum system should adjust these two variables until it achieves the maximum deterrence at the lowest possible enforcement cost. A system based on private enforcement, with the penalty going to private parties, cannot achieve this because the size of the penalty and the frequency of suit cannot be changed independently; the likelihood of suit necessarily increases with the size of the potential recovery.

Fourth, some economists argue that government prosecution provides a more efficient mechanism than private litigation because government prosecutors will be selective in their prosecutional decision-making and more likely procure policies that deter the most offensive behavior at the lowest enforcement cost. It is argued that even where price-fixing has occurred on an industry-wide basis, the net effect of suing all of the principal sellers for treble damages (particularly where cross-elasticities are low) may be to raise prices to current purchasers of the products.

Fifth, economists who favor private enforcement criticize the treble damage remedy on the ground that it creates "perverse incentives." They argue that the possibility of a treble damage recovery may induce the victims of monopolistic practices to acquiesce in the violation in order to increase the three-fold recovery they can sue to obtain later on.

Sixth, it is claimed that the treble damage remedy increases so-called "error costs." These are the costs which arise when the antitrust laws are misapplied in a fashion which encourages anti-competitive behavior or deters aggressive, healthy competition. It is argued that these costs are magnified by the provision for trebling, and that the provision may actually induce plaintiffs to misinform the court about the true nature of the defendant's conduct.

C. Actual and proposed piecemeal repeals of the treble damages remedy reflect concern that automatic trebling is not appropriate in all antitrust cases. However, if and to the extent that the remedy is inherently unsound in its current form, they do not correct its deficiencies in those cases where it is applied.

During the last several years, the treble damage remedy has been eliminated in a number of contexts:

-- The National Cooperative Research Act of 1984 limited antitrust liability for joint R&D ventures to actual damages provided that the venture has been reported to the Justice Department and the FTC and the conduct involved does not violate the terms of an outstanding injunction or FTC cease and desist order.

-- The Local Government Antitrust Act of 1984 eliminates monetary damages altogether in antitrust suits brought against local governments, local government officials and other parties acting at the direction of a local governmental body or official.

- -- The Export Trading Company Act of 1982 immunizes from damages export trading conduct which is covered by a certificate obtained from the Commerce and Justice Departments and limits to actual damages the amount that can be recovered from a certificate holder for failure to comply with the applicable statutory criteria.
- -- By 1982 amendments to the Clayton Act, foreign governments (in most circumstances) and the United States (in all circumstances) cannot recover more than actual damages as antitrust plaintiffs.

Additionally, the proposed Foreign Trade Improvements Act, which has been introduced by Senator De Concini, would allow courts to limit an antitrust recovery to actual damages when another nation's interests would be adversely affected by a treble damage award and the limitation would substantially reduce its adverse effects.

III. Analysis of the Administration's Proposals

A. Limiting Treble Damages To Overcharged Buyers And Underpaid Sellers

The Administration's proposal does not adopt the more extreme suggestions made by economic analysts. It does not replace the entire system of private enforcement with public enforcement. Nor does it reject compensation as a legitimate goal of private enforcement.

This is not to say that the proposal ignores the economic criticisms of the current law. The proposal would eliminate competitors as treble damage plaintiffs. This is consistent with the view of critics who consider suits by rivals to be unnecessary and indeed undesirable for three principal reasons: first, because the kind of conduct which a rival is likely to attack (e.g. a tie-in or exclusive dealing contract) is visible conduct which those paying supra-normal prices can adequately detect and attack; second, because the rival has an incentive to bring suit to raise the defendant's costs rather than to preserve competition so that rival suits increase the chance of "error costs" occurring; and third, because the basis from which a rival's treble damages are calculated (i.e. accounting lost profits or lost value) is a worse proxy than overcharges or underpayment for determining what economists consider to be the "economic" loss produced by wrongful conduct, i.e., the amount of "monopoly net" retained by the defendant or the "allocative loss" which occurs as a result of wrongful conduct.[2]

More fundamentally, however, the proposal is designed to change the system of remedies so that it will better achieve the four objectives described in the legislative history and traditional literature: (1) to punish where punishment is appropriate; (2) to deter where deterrence is desirable; (3) to encourage private enforcement action against action where punishment and deterrence are appropriate and desirable; and (4) to compensate the victim of wrongdoing. The proposal in this respect is based on a series of assumptions.

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[2] See Easterbrook, "Detrebling Antitrust Damages" 28 Journal of Law and Economics, No. 2 (May, 1985)

The fundamental assumption is that the utility and illegality of much, if not most, business conduct is at best ambiguous; conduct which may appear to be anti-competitive may in fact be pro-competitive or neutral. This assumption seems sound. The Supreme Court has certainly eroded drastically the bright line tests afforded by *per se* rules in cases like *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *Monsanto Co. v. Spray-rite Serv. Corp.*, 104 S. Ct. 1464 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985); and *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984). In several of these cases--i.e., *Broadcast Music*, *Monsanto* and *Northwest Wholesale Stationers*--the Court has drawn back from *per se* rules because of the ambiguity which the Administration describes.

The second assumption is that punishment is not appropriate in the case of conduct which falls into the grey rule-of-reason area. This assumption also seems sound. Under tort law generally, punitive damages are not awarded unless the defendant has knowingly engaged in wrongful conduct. The Administration's assumption is consistent with that law.

The third assumption is that treble damages, if applied to conduct that falls into the grey area, may create "perverse" incentives both with respect to business conduct and with respect to the prosecution of private antitrust actions. This assumption appears to be logically unassailable. As discussed above, two of the most powerful reasons for treble damages which have been advanced are that they deter conduct by making it potentially very expensive and they serve as an incentive for detecting and prosecuting that conduct. If one assumes that some of the conduct in the grey area is conduct which is pro-competitive or neutral, then _a_ _fortiori_ treble damages may operate to deter businesses from engaging in that conduct and may encourage the prosecution of lawsuits based on that conduct.

The fourth assumption is that competitors are more likely than persons who have been overcharged (buyers) or underpaid (sellers) to bring treble damage actions attacking conduct which is pro-competitive or neutral. There may not be rigorous statistical evidence to support this assumption, but it enjoys substantial support in common sense. Competitors are the ones whose oxes are gored by hard competition, and they have a built-in incentive for attacking that kind of conduct which buyers and sellers do not have.

The fifth and final assumption is that eliminating competitors as treble damage plaintiffs will not materially detract from the deterrent functions which treble damages have traditionally been thought to serve. Again, this assumption appears to be logically supportable. The change would leave overcharged buyers (and underpaid suppliers) as potential treble damage plaintiffs. There is no logical reason why their presence alone in the wings should not operate as a deterrent. Nor is there any logical reason why their incentive to search for and prosecute violations should be affected by the elimination of competitors as potential treble damage plaintiffs.

It may be argued that the change proposed does not go far enough in several respects. For example, there is nothing in the legislation to prevent a buyer from suing for and recovering treble damages from participants in a vertical resale price conspiracy--conduct which some scholars believe may be pro-competitive at least in some instances.[3] Indeed, there is nothing in the legislation to prevent a buyer from suing to recover treble damages from its seller for unilateral conduct (e.g., attempted monopolization) allegedly resulting in overcharges; such conduct may well fall into the "grey area." However, these are arguments for making fundamental changes in the substantive law; they are not arguments against going as far as this legislation goes.

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[3] There is substantial authority that the rule in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) does not bar such buyer suits. See ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) 392, note 67.

Finally, it may be argued that the legislation goes too far in one respect; that is its impact on predatory pricing and non-price predation such as the filing of baseless litigation. This kind of predatory conduct is conduct which buyers (and suppliers) normally have no incentive to stop while it is occurring. Indeed, it is only after it has occurred successfully that a buyer is "overcharged" and hence would have a treble damage remedy under the proposed legislation. It may well be that the elimination of competitors as treble damage plaintiffs will weaken private enforcement efforts against this kind of conduct. There is no ready way to avoid that result, however, without compromising what otherwise seems to be an effective approach to rationalizing the treble damage remedy.[4]

B. Pre-judgment Interest

The treble damage limitation is accompanied by a proposal to award pre-judgment interest to injured persons other than treble damage plaintiffs. The proposal in this respect is consistent with the longstanding objective, discussed above, that the system of private remedies fully compensate victims of antitrust violations, however unintentional those violations may be. The proposed statutory scheme would produce that result. The treble damage remedy would almost surely provide full compensation to injured buyers and suppliers. Pre-judgment interest would provide full compensation to others, including injured rivals.

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[4] It may be that the more vigorous public enforcement can take up any slack left by this possible gap in private enforcement. The FTC has already begun to concentrate on non-price predation.

As it now stands, however, the proposal is ambiguous in two respects. First, by its terms, pre-judgment interest is to be awarded in single damage cases on the entire amount of damages "beginning on the earliest date for which injury can be established." This language, if read literally, would overcompensate a plaintiff whose damages increased as time went on and should be corrected.

Second, under the language of the proposal, pre-judgment interest on damages that are trebled may be recovered if the court finds that the defendant engaged in dilatory or bad faith conduct during the litigation. This seemingly goes beyond the current language of Section 4, which allows the court to award pre-judgment interest on damages that are trebled only for the period of delay caused by the defendant's dilatory or bad faith conduct during the litigation. If and to the extent that pre-judgment interest is awarded on damages that are trebled for a period which is unrelated to the period of delay caused by a defendant's misconduct during the litigation, the proposal goes well beyond what is necessary to compensate the plaintiff for the injury caused by that misconduct, and the language should be corrected.

C. Federal Government Remedies

This proposal would give the federal government the same remedies, including treble damages, as those possessed by other antitrust plaintiffs. It is arguable that treble damages do not give the federal government the same incentive to detect and prosecute wrongdoing that they give potential private beneficiaries of a treble damage award. Otherwise, however, there is no apparent reason to treat the federal government differently than other antitrust plaintiffs.

D. Attorney's Fees

This proposal would give antitrust defendants their costs and attorney's fees when the plaintiff's suit is "frivolous, unreasonable, without foundation, or in bad faith." The stated objective here is to prevent "strike suits" filed "primarily to extract a settlement from a defendant for something less than the defendant's anticipated costs."

Whether or not such "strike suits" are prevalent, however, is uncertain. The House Judiciary Committee's February, 1984 "Study of the Antitrust Treble Damage Remedy" did report that out of more than 3,700 private antitrust lawsuits brought between 1964 and 1969, only 73 ended in judgments favorable to plaintiffs. However, the vast majority of these suits (3,286) were settled for reasons known only to the parties.

Moreover, it may be opined that the proposal is superfluous because it is co-extensive with Rule 11 of the

Federal Rules of Civil Procedure. That rule already provides for recovery of attorney's fees where a plaintiff or his counsel has filed a complaint (or any other paper) which is not "to the best of his knowledge, information and belief formed after reasonable inquiry . . . well founded in fact and . . . warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . ." The rule has been read to extend to the filing of any complaint which is (1) frivolous, (2) legally unreasonable, (3) without factual foundation, or (4) in subjective bad faith. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986); see also Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

On the other hand, the Administration asserts that the proposal would go beyond Rule 11. If and to the extent this is true, it is possible that the proposal would operate to chill plaintiffs from bringing legitimate actions for fear of being saddled with substantial attorney's fees if they are not successful. This could undercut the private enforcement scheme, and should not be supported.

E. Claim Reduction

The Administration's proposal would establish new rules for reducing the claim of an antitrust plaintiff that has settled with and released a defendant or potential defendant from liability. Under the approach set forth in the proposed bill, which would amend Section 4 of the Clayton Act, the damage claim of an antitrust plaintiff that has settled with and released a defendant from liability would be reduced by at least the proportionate share of that claim fairly allocable to the settling defendant. The non-settling defendants would remain jointly and severally liable for the remainder of the plaintiff's damages. The claim reduction rule would apply to all private antitrust actions.

The Administration's proposal was developed in response to the perceived need to redress an unfairness inherent in the existing system of antitrust remedies law. Under the principle of joint and several liability, an antitrust defendant is liable for treble the damages caused not only by its own particular acts but also for treble the damages attributable to all other alleged co-conspirators. In the context of liberal antitrust damage standards and multi-district class actions, potential treble damage exposure in a antitrust suit can be staggering.[5]

The current potential for open-ended liability may drive even innocent companies toward settlement once some other defendants have settled, perhaps for less than their fair share. As more defendants settle, the pressure on the non-settling defendants increases, and a plaintiff will generally seek to settle with them at higher amounts than the earlier settlements. Such "whipsawing" is undesirable from the standpoint of antitrust policy, since it renders irrelevant the guilt or innocence of the defendants, and the amount of damage actually caused by a particular party.[6]

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[5] Modern communications make it possible for an alleged conspiracy to cover an entire, multi-billion dollar market. The fraudulent concealment doctrine can extend the claimed damage period to ten or twenty years. Class actions multiply the damage claims still more, and lenient rules regarding pleading and proof of conspiracies make a finding of liability for "more damages than anyone can pay" a real possibility. See New Approaches to Antitrust Damages: The Alternatives to Mandatory Trebling (Judge Griffin Bell) 39 Business Lawyer 1089, 1094 (May 1984).

Apart from the potential for abusive settlement tactics, the combination of treble damages and joint and several liability can also lead to other unfair results in the allocation of antitrust liability. Since a plaintiff is free to collect all of its treble damages from any one of a group of alleged conspirators, liability may be apportioned according to the whims of a plaintiff, rather than in accordance with any concept of culpability. In some instances, the companies with the greatest market shares, who arguably would have benefited the most from an alleged conspiracy, may pay less than their fair share of damages or nothing at all, while companies with much smaller market positions may be forced to satisfy a judgment for most of an industry's liability.[7]

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[6] The current system of antitrust remedies has been described as "a very attractive hunting ground for people who want a settlement involving large amounts of money, even though no real violation of the antitrust laws has occurred." New Approaches to Antitrust Damages, supra at 1092 (William Breit).

In the 97th and 98th Congresses, consideration was given to contribution legislation as a means to remedy these problems. Under the most recent contribution legislation introduced in Congress,[8] a defendant in a price-fixing case would remain jointly and severally liable, but could sue to force other conspirators to contribute their fair share of the damages. There would be no right of contribution against settling defendants, but mandatory "claim reduction" would apply so that the amount of the plaintiff's claim would be reduced by at least treble the actual damages attributable to the settling defendants' sales or purchases.

A major criticism against contribution legislation is the increased complexity that such a remedy would entail. Because antitrust defendants would be forced to sue each other

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[7] _See_ _e.g.,_ _Texas Industries, Inc. v. Radcliffe Materials, Inc._, 451 U.S. 630 (1981) (plaintiff sued only one of four alleged participants in a conspiracy to fix the price of ready-mix concrete and held that company responsible for all of the treble damages caused by the alleged conspiracy); _Olsen Farms, Inc. v. Safeway Stores, Inc._, 649 F.2d 1370 (10th Cir. 1979) (plaintiff sued only one of five alleged price fixers for damages and held that individual company, with only 11.8% of the relevant market, liable for all of the treble damages caused by the alleged conspiracy).

[8] S. 3060 was introduced by Senator Orrin Hatch on October 3, 1984. This bill was nearly identical to S. 995, a bill introduced in 1981 in response to _Texas Industries, Inc. v. Radcliffe Materials, Inc._, 451 U.S. 630 (1981), in which the Supreme Court resolved a dispute in the circuits by refusing to allow a right of contribution to defendants in antitrust cases.

(along with any other companies that might be liable) at the same time that they defend themselves, it is likely that more companies could become embroiled in litigation, that the costs of these cases would escalate, and that antitrust suits would become more complex and unmanageable.[9]

S.1300, a bill introduced in June 1985 by Senate Judiciary Committee Chairman Strom Thurmond as an alternative to contribution legislation, provides for an antitrust law violator in certain suits to be subject only to treble the damages attributable to its violation. The legislation would eliminate joint and several liability only in cases challenging agreements among competitors in which the damages awarded are based on impact on price. Liability would be apportioned on the basis of the overcharges or undercharges attributable to a particular defendant's sales or purchases.

Proponents of S.1300 believe that this approach to damage allocation would bring about a more desirable balance than now exists between the parties in horizontal price-fixing and similar cases. By making each defendant liable only for the injuries attributable to that defendant, the size of a defendant's potential liability will in most cases bear a logical and natural relationship to culpability and benefit.

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[9] See Statement of William F. Baxter, Hearings on S. 995 before the U.S. Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 16 (April 22, 1981); D. Polden and E. Sullivan, Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis; 20 Harv. J. on Legis. 397, 410-413.

In its consideration of contribution legislation in 1979, the Section endorsed the concept of apportionment of damages, having concluded that existing procedures for assessing damages can operate unfairly on defendants and that the problem can be addressed in major part through this type of reform.[10]

While both the claim reduction rule embodied in the Administration's bill and the individual treble damage liability concept of S.1300 have been developed in response to the need to redress abuses in the existing system of antitrust remedies, the two approaches differ both in operation and effect. Although claim reduction would alleviate the problem of settlement abuse, it would not provide relief in a situation in which an antitrust plaintiff chooses to sue less than all of the alleged co-conspirators.[11] In contrast, S.1300 eliminates the potential for joint and several liability abuse in both the settlement and litigation process, because each company's potential treble damage liability could not exceed the individual consequences of its own actions. Thus, a plaintiff would be encouraged to join as defendants all those who have assertedly caused it harm in order to recover its full treble damages.

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[10] "Report of the Section of Antitrust Law on Proposed Amendment of the Clayton Act of Permit Contribution in Damage Actions," 49 Antitrust Law Journal 291.

[11] As Assistant Attorney General Baxter explained in 1982, claim reduction would not address "the other major fairness concern" with joint and several liability - "namely, the possibility that some antitrust violators may escape damage liability entirely while others pay for their misdeeds." (Letter from Assistant Attorney General William F. Baxter to the Honorable Peter R. Rodino, Jr. at Hearings, p. 564 (July 30, 1982).)

Additionally, the Administration's claim reduction bill is applicable to all private damage actions, while S.1300 is limited to cases challenging agreements among competitors in which the damages awarded are based upon impact on price. These are typically the type of multi-defendant, industry-wide liability cases in which the greatest abuses of the joint and several liability doctrine have occurred, and are the type of cases in which it is most appropriate to determine the individual share of damages attributable to each defendant according to its purchases or sales.

Thus, of the three approaches -- contribution, claim reduction, and individual treble damage liability -- the last approach may be the most efficient and appropriate solution to the problems inherent in current rules of joint antitrust liability. Contribution raises serious concerns because the introduction of cross-claims among defendants could complicate antitrust litigation to a greater extent than already exists.[12] Claim reduction, as exemplified by the

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[12] See e.g., Testimony of Richard S. Kelly before the Subcommittee on Monopolies and Commercial Law of the House Judicial Committee, March 16, 1982, at 7-8; D. Polden and E. Sullivan, Contribution and Claim Reduction In Antitrust Litigation: A Legislative Analysis, 20 Harv. J. on Legis. 397, 410-13 (describing "significant repercussions" a right on contribution would have on both in-court and out-of-court costs); Statement of William F. Baxter, Hearings on S. 995 before the U.S. Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 16 (April 22, 1981).

Administration's bill, alleviates the problem of settlement abuse, but does not address the potential for joint and several liability abuse in the litigation process which is a target of S.1300, and could also create an incentive for plaintiffs not to join all defendants.

Those opposed to the concept of individual treble damage liability exemplified by S.1300 have indicated that the elimination of joint and several liability may have an adverse impact on deterrence.[13] However, deterrence may actually be enhanced by a rule which is more likely to impose some liability on each defendant over a rule which could arbitrarily place all of the liability upon one defendant and thereby create a windfall to the others.[14]

In the event that Congress is reluctant to significantly limit joint and several liability in private antitrust litigation, it may still be possible to accommodate both the need to address the abuses inherent in the current system and the desire to preserve that concept. One possible approach would be to preserve joint and several liability with respect to the sales of all joined defendants. Such an approach would start with mandatory claim reduction as a base: a plaintiff's claim would be reduced by the damage attributable to all settling defendants. However, in addition, the plaintiff could not claim damage attributable to co-conspirators deliberately not joined as defendants.

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[13] See, Testimony of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Before the Committee on the Judiciary, United States Senate, Concerning S. 1300, July 29, 1985.

[14] See Letter of James T. Halverson and other former Antitrust Section Chairpersons to Senator Strom Thurmond in support of S.1300, Sept. 17, 1985 at 10, citing Justice Brennan in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 88, 110 A.2d 24, 34 (1954)' "If each intentional wrongdoer knew that his conduct was exposing him to the risk of certainty of liability in some amount, the desired deterrent effect would be produced more surely than if [apportionment of liability] among wrongdoers is denied."

This suggested alternative would have the advantage of encouraging a plaintiff to join all alleged wrongdoers as defendants -- an incentive which is sacrificed in the Administrative's "pure" claim reduction approach. The concept of joint and several liability would also be preserved and, to the extent that such liability helps to deter anti-competitive behavior, the deterrence factor would remain intact. Such a compromise would be particularly appropriate in the type of horizontal price cases covered by S.1300, where a plaintiff may more readily be able to identify the members of the alleged conspiracy which injured him. However, possible complexities might arise if the approach were extended to all private antitrust actions. Nevertheless, such an extension might be justifiable if appropriate guidelines for determining apportionment of liability could be formulated, as is attempted in Subsection 4I (b)(2) of the Administration's claim reduction bill.

VII. CONCLUSIONS

The changes in the proposed damage remedy itself (i.e., limiting treble damage plaintiffs to those who were overcharged or underpaid, awarding other plaintiffs prejudgment interest, and treating the federal government like other antitrust plaintiffs) are generally consistent with the objectives for private remedies which have been articulated; they represent a salutory refinement of the remedial scheme to better achieve those objectives, taking into account the fact that most business conduct falls into a grey area under current substantive law.

The changes proposed with respect to the recovery of pre-judgment interest are flawed in their current form because they would over-compensate a plaintiff. However, if those provisions are revised to eliminate those flaws, they should be enacted.

The addition of the provision for recovery of attorney's fees by defendants might unduly impair private enforcement, and should not be enacted.

The individual treble damage liability approach of S.1300 is preferable to the Administration's claim reduction bill, but the latter deserves enactment if a bill like S.1300 fails to gain sufficient support in Congress.

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May 20, 1986

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

In response to your letter of May 7, the following are some brief written responses to your questions and those of Senator Specter:

QUESTIONS FROM SENATOR SPECTER:

1. A working group formed by the Domestic Policy Council and the Economic Policy Council of the Cabinet has completed an extensive review of the antitrust laws and competition in the United States. What were the working group's findings which support the Administration's proposal to provide for the recovery of treble damages only for those injuries sustained by reason of the plaintiff "having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages?" What were the working group's findings which support the recovery of actual damages in all other cases?

Answer: The group's November 8, 1985 memo noted that trebling can have serious anticompetitive side effects where potentially procompetitive practices such as aggressive low pricing or innovative distributional practices are involved. The threat of trebling can cause some firms to avoid such conduct, even though it may have significant economic benefits. And, often these practices are challenged by competitors whose commercial or financial motives diverge substantially from the public interest. These competitors may use the threat of treble damage actions to force a successful rival to abandon or restrict conduct that enhances efficiency and lowers prices to consumers. Such litigation exacts a high price from defendants, the economy and consumers.

SECTION OF ANTITRUST LAW

The serious nature of such problems has received much recent attention from the courts, Congress and legal and economic scholars, and it seems that a modification of the trebling rule is now warranted. By keeping the strictest penalty for use only on the most egregious offenses, while still allowing actual damages plus interest for other offenses, the Working Group feels that deterrence of cartel behavior would be somewhat increased while deterrence of business conduct that may benefit consumers and the economy should be significantly eliminated. The section of Antitrust Law concurs in that belief.

2. Under existing antitrust laws, the United States never can recover more than actual damages. This legislation would provide the United States, as an overcharged purchaser, with a treble-damage remedy against price fixers and bid riggers. What are the policy justifications for this legislative proposal? To what extent do you foresee any increase in the deterrent factor by this proposed amendment in the antitrust laws?

Answer: The Working Group's November 8 memo stated that "Trebling damages in certain government damage cases will help deter cartel activity that adversely affects the public treasury." Theoretically, there is little difference between the public's interest in deterring cartel-like behavior directed against private consumers and that directed against the government in its contracts. In the end, the taxpayer pays the bill. Trebling of damages in government cases could and should in fact increase deterrence of cartel-like behavior by those contractors who currently feel that they can afford to fix prices and take the risk of eventually paying only single damages to the government. Provision for the treble damages remedy only in instances where the government has been overcharged or underpaid would make the statute internally consistent, optimally efficient, and essentially fair.

3. Title III of S. 2162 amends antitrust laws provisions for the award of attorneys' fees, which are an integral part of private enforcement of the antitrust laws. What misuses, if any, of this process support the legislative proposal to award costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith."

Answer: As you know, I testified before the Committee on behalf of the Section of Antitrust Law of the American Bar Association on all aspects of S. 2162 except claims reduction, where I testified as an individual. The Section of Antitrust Law opposes the provisions of S. 2162 dealing with attorneys' fees, for reasons which are outlined in my formal statement at pages 15 and 16. Basically, the Section feels that the proposal is coextensive with Rule 11 of the Federal Rules of Civil Procedure and therefore unnecessary. Since Rule 11 was modified to allow for sanctions against unwarranted or bad faith complaints, it has provided a safeguard against the type of complaints addressed by S. 2162.

QUESTIONS FROM CHAIRMAN THURMOND:

1. Do you believe that the Administration's proposal to provide treble damages in overcharge situations but actual damages to competitors would deter the worst antitrust violations while encouraging aggressive competition by reducing harassment suits?

Answer: Yes.

2. Do you agree with the Administration that the federal government should recover treble damages in civil suits?

Answer: Yes. See reply to Senator Specter, No. 2 above.

If there are any further questions, please do not hesitate to contact me.

Best regards.

Sincerely,

James T. Halverson

James T. Halverson

cc: Officers and Council, Section of Antitrust Law
Maurice Barboza, Esq.
Ms. Candy L. Osterbusch

Senator GRASSLEY. Mr. Irvine.

STATEMENT OF JOHN A. IRVINE

Mr. IRVINE. Thank you. Good morning, Senator. On behalf of the U.S. Chamber of Commerce, let me express my appreciation for the opportunity to present the chamber's views on the Antitrust Remedies Improvements Act.

The chamber heartily endorses the efforts of the administration to propose much-needed adjustments in the remedies scheme. The chamber has previously endorsed proposals to apportion damages fairly in antitrust cases.

Additionally, we support those provisions of titles II and III which provide for the award of costs and attorneys' fees to defendants in certain limited circumstances, and the elimination of treble damages in some cases.

Our system of justice has provided for the award of attorneys' fees only in limited circumstances. This sharply diverges from the English system where prevailing litigants are granted their attorneys' fees as a matter of course.

The antitrust law is one exception to the American rule on attorneys' fees. The fee-shifting presently available under the antitrust laws is, however, only one way. That has helped to create an undesirable imbalance and has encouraged the filing of frivolous claims against risk-averse defendants who, as a matter of business necessity and judgment, often pay substantial sums in settlement. This is not only unfair, but economically inefficient.

The administration's proposal is a reasonable and measured response to that problem. It is not a proposal to inject two-way fee-shifting, the English rule, into the remedies scheme.

Title III allows defendants to recover their attorneys' fees only when a plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith. I think in disagreeing to some extent with Mr. Halverson, or clarifying the point, as the case may be, that this provision will go farther than rule 11, and we think it is necessary that it does go farther than rule 11.

Thus, the provision will serve as a statutory filter for meritless claims or for claims that might prove to be meritless after the claim was filed. There should be no fear that plaintiffs with legitimate claims will be deterred from asserting them.

With its enactment, no longer will an antitrust plaintiff be in a position to prosecute a claim without the slightest regard for the legitimate rights of those he accuses. We think the provision is fair and workable.

The detrebling provision of the remedies bill is likewise a welcome corrective adjustment to the imbalance presently existing between the legitimate goal of deterring anticompetitive conduct and the need to allow and encourage innovative and procompetitive conduct.

Title II preserves existing treble damage relief for plaintiffs who have been overcharged or underpaid. The type of anticompetitive conduct giving rise to such damage is manifestly anticompetitive, yet difficult to detect. The need for deterrence and the desirability of inducement to prosecute is great.

Present law, however, may discourage aggressive procompetitive activity in a variety of situations not involving overcharges or underpayments. It is in these close cases that a competitor may seek to chill rather than to enhance competition by preventing a rival's aggressive strategy.

In such cases, the line between procompetitive and anticompetitive conduct is not so clearly drawn. Yet, the conduct itself is open, notorious, and readily available to public scrutiny.

If such conduct is ultimately found to be anticompetitive, the chamber believes that the defendant should pay full damages, but not punitive treble damages.

The chamber opposes section 202 of the remedies bill, which allows the United States to recover treble damages. Given the investigative and prosecutorial powers available to the U.S. Government, and their clear mandate to exercise those powers both civilly and criminally, the United States does not need any additional incentive to prosecute antitrust cases, to do that which it is required to do by law.

The enforcement of the Government's rights is the business of the Department of Justice, and it strikes us as unseemly to offer the Government a financial incentive or reward to accomplish that which it is required to do.

Finally, the chamber opposes title II's proposed award of prejudgment interest. Instead of compensation to a plaintiff, this scheme, as embodied in title II, would result in the imposition of an unfair and additional penalty on defendants in many cases.

Antitrust damages are usually incurred over a period of years. There is inherent in the proposal an unfairness which is exacerbated in cases where the bulk of the damages are not incurred at the beginning of the damage period. I cite the example given by Mr. Halverson a moment ago.

Efforts by the court to adjust the amount of interest according to the flexibility standard that we understand is proposed in this provision, and to correct some of the unfairness would precipitate, we believe, intractable problems of proof.

The provision is really at odds with the notion that the antitrust laws are to encourage the prompt investigation and filing of suits to correct violations by private attorneys general.

The award of prejudgment interest may actually serve as an incentive to delay the prosecution of antitrust claims in some cases. For these reasons, the chamber is opposed to the prejudgment interest provision contained in the administration's package.

Senator, I would ask that my prepared remarks be placed in the record, and I thank you for the opportunity to appear and to present the chamber's views on these matters.

Senator **Grassley**. The record will contain your complete statement.

[The prepared statement follows:]

STATEMENT
on
THE ANTITRUST REMEDIES IMPROVEMENTS ACT (S. 2162)
before the
SENATE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
John A. Irvine
May 7, 1986

I am John Irvine, a partner in the Houston, Texas law firm of Porter & Clements. During my career, I have had the opportunity to try antitrust cases, both civil and criminal, to counsel extensively on antitrust concerns, and to prosecute and to defend numerous state and federal criminal cases. I have come thereby to appreciate the relative effectiveness of various types of deterrent measures on criminal conduct. Lastly, I served for three years as Assistant General Counsel of The Mead Corporation and experienced firsthand the abuses that can exist under the current remedies scheme of the antitrust laws. These varied experiences give me both a unique perspective of and a strong interest in the subject of my remarks today: The Antitrust Remedies Improvements Act (S. 2162).

I am testifying today on behalf of the U.S. Chamber of Commerce and its Council on Antitrust Policy of which I am a member. The U.S. Chamber strongly supports the efforts of the Reagan Administration to adjust the remedies scheme of the antitrust laws. We believe that S. 2162 does much to advance the debate on several important issues. We commend the Administration for those efforts and thank this Committee for the opportunity to participate in these discussions.

My remarks today are intended to address only four of the five major provisions of the "remedies bill." I leave aside the issue of claim reduction for the reason that other witnesses have expressed the Chamber's strong support for legislation to apportion damages fairly in private antitrust legislation.

Regarding the other provisions of the remedies bill, the Chamber supports those portions that provide for the recovery of attorneys' fees by substantially prevailing defendants in limited circumstances and that eliminate the recovery of treble damages in cases not involving overcharges or underpayments. The Chamber opposes that portion of the bill providing for the recovery of treble damages by the United States in overcharge/underpayment cases and likewise opposes the portion providing for prejudgment interest beginning with the earliest date for which injury can be established.

Existing legislation provides for the recovery of attorneys' fees by successful private plaintiffs in antitrust cases. Though inconsistent with the generally prevailing "American Rule," which denies attorneys' fees to either party in other litigation contexts, the policy is justifiable as a legitimate response to the complexity and consequent expense involved in antitrust litigation. Moreover, the award of attorneys' fees to a successful plaintiff is consistent with the goal of providing full compensation to the victim of antitrust law violations and offering appropriate incentives to bring meritorious suits.

The portion of the remedies bill providing for the recovery of attorneys' fees by successful defendants in certain limited circumstances in no way detracts from this policy. Rather, the defendants' attorneys' fees provision is a limited and carefully measured response to the substantial problem of meritless antitrust "strike" suit litigation. Examples of cases where meritless antitrust claims have been added to basic contract litigation or where innocent parties are sued simply on the basis of their participation in a challenged industry -- all for the coercive effect of exposure to expensive litigation and treble damages based on industry sales -- are well known to most trial lawyers. Such suits unintentionally have been encouraged by the incentives that plaintiffs presently enjoy under the antitrust laws. The remedies bill provision offers a much-needed measure of deterrence to the abuse of those incentives.

The proposal allows fee-shifting for substantially prevailing defendants in a very narrow class of cases: those in which the plaintiff's conduct was "frivolous, unreasonable, without foundation, or in bad faith. 1/"

1/ Taken directly from the language of the Supreme Court's opinion in Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978), this standard falls appropriately short of full-scale fee-shifting along the lines of the "English Rule." Under the English system, the prevailing party is entitled to his attorneys' fees.

This standard is the filter through which an antitrust plaintiff's case should pass in order to insulate a plaintiff from the risk of liability for defendants' attorneys' fees. Without it, antitrust plaintiffs risk little by prosecuting baseless suits in hopes of forcing an innocent but risk-averse defendant into a settlement.

While existing law and procedure protect somewhat against the filing of the malicious or fabricated cause of action, 2/ more deterrence is needed. See generally Rowe, Attorney Fee Shifting, 1982 Duke L.J. 651, 666 (1982). Existing rules, for example, do not fit neatly into the situation where a claim, apparently meritorious when filed, later is discovered to be without foundation. The Christiansburg formulation solves this problem.

In summary, the limited fee-shifting envisioned by the remedies bill is an important and necessary device that protects innocent defendants from the abuse of the economic incentives offered plaintiffs under the antitrust laws. The Chamber strongly supports this portion of the bill.

The Chamber fully supports Section 201 of the remedies bill's limitation on the award of treble damages to those cases involving overcharges or underpayments. The conduct typically giving rise to these types of damages is manifestly injurious to competition and appropriately is subject to the penalty of threefold liability. Horizontal arrangements like price-fixing or bid-rigging are offenses against economic efficiency and consumers that cannot be too harshly discouraged. In addition, the consequences of such conduct are predictable and obvious in the sense that, as an attorney, one is able to advise a client in advance about the legality of contemplated practices of this sort. There is no gray area.

On the other hand, numerous types of economic behavior that may give rise to liability for threefold damages under the present antitrust laws are not categorized as easily as anti-competitive. For example, aggressive pricing policies designed ultimately to increase profits by capturing new customers in some cases may be characterized successfully by a competitor as violative of the antitrust laws. Yet, it is infinitely more difficult to

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2/ E.g., Fed. R. Civ. P. 11.

assess in advance for a client the risk that it will pay three times the price for behavior that appears pro-competitive but is later shown to be unlawful. The result is that clients are often counseled to avoid practices that very well may enhance competition and result in lower prices for consumers.

Eliminating the treble damage penalty except in cases of overcharges or underpayments also squares with the underlying objective of antitrust legislation: to protect competition, not competitors. Typically the "close" cases are not filed by those claiming to have been overcharged or underpaid. It is the business competitor that usually brings a marginal case, often in hopes of forestalling aggressive and economically efficient behavior by a rival. The specter of treble damage liability then is raised successfully by the competitor-plaintiff to coerce the rival into less aggressive competition. The loser here, of course, is economic efficiency and, ultimately, the consumer. Elimination of the leverage presently enjoyed by competitor-plaintiffs by restricting the treble damage remedy only to overcharge/underpayment cases solves this troublesome problem. For this reason, the Chamber strongly supports this aspect of the remedies bill.

The Chamber opposes the portion of the remedies bill that provides for awards of prejudgment interest. By providing for interest "for the period beginning on the earliest date for which injury can be established" the remedies bill departs from notions of full compensation and imposes instead what amounts to a penalty.

Antitrust violations frequently occur over a period of years. As a result, a system that awards prejudgment interest on the entire amount of damages suffered by a plaintiff beginning with the date of first injury is both illogical and unfair. This effect is exacerbated in any case where the bulk of the injury does not occur toward the beginning of the relevant violation period.

Little comfort can be taken from the language in Section 201 giving the trial court flexibility to withhold or adjust prejudgment interest in certain cases. Where the basic unfairness of an award of prejudgment interest from the date of first occurrence of the injury is a function of the timing of the damages over the applicable damage period, the problem of adjustment would be complex if not insurmountable.

Further, to award a plaintiff interest from the date of first injury is counterproductive relative to the goal of encouraging the victims of anti-competitive conduct to investigate promptly that conduct and file suit as a private attorney general. Section 201, as presently drafted, may serve as an incentive to delay the filing of otherwise meritorious claims.

In short, the prejudgment interest scheme contemplated by the remedies bill is economically unsound and unfair; the Chamber opposes it for those reasons.

It is only superficially appealing to suggest that the United States government should enjoy the recovery of treble damages in those cases in which it is available to private plaintiffs.

In the first place, the predominate purpose in providing for treble damage recovery under the antitrust laws was to encourage the policing of anti-competitive conduct by private attorneys general. The treble damage remedy served as a financial incentive to accomplish this purpose by rewarding a successful plaintiff with an excess of recovery as an award for the risks undertaken in filing and prosecuting a suit.

The government, however, should need no windfall to induce it to do what it is required to do by law. It is the responsibility of the Department of Justice aggressively to prosecute, whether in a civil or criminal context, those whose anti-competitive behavior causes damage to the government. In contrast to the often meager resources of the private antitrust plaintiff, the United States government has sufficient wherewithal to redress wrongs against it. Further, to provide the government a windfall to reward it for the accomplishment of its legal duty would create incentives fundamentally inconsistent with the proper role of the Department of Justice in the enforcement of the law. For these reasons, the U.S. Chamber opposes that portion of the remedies bill that would grant treble damages to the United States under any conditions.

In conclusion, the U.S. Chamber supports strongly the Administration's efforts to focus attention on what we believe are badly needed reforms in the remedies scheme of the antitrust laws. Of paramount importance to that reform is the legislative adoption of contribution and claim reduction. While we support the proposals granting defendants' attorneys' fees in limited circumstances and abolishing treble damages in some cases — both of which will serve to curtail abuses in the area of private enforcement of the antitrust laws -- we oppose the proposal granting the United States treble damages and the proposal allowing prejudgment interest, as unnecessary and/or overly complex and unworkable.

Senator GRASSLEY. Mr. Milstein.

STATEMENT OF MONROE G. MILSTEIN

Mr. MILSTEIN. Mr. Chairman, members of the committee, I am Monroe Milstein, president of the Burlington Coat Factory Warehouse headquartered in Burlington, NJ. I am here today on behalf of the Association of General Merchandise Chains, which represents the Nation's price-competitive general merchandise retail industry, including the Burlington Coat Factory, and also representing the American consumer.

I respectfully ask that the full text of my comments be put into the record.

Today, I am here to voice great concern over the impact that the so-called remedies bill to detreble will have on our industry and on small business and the consumer. As this committee is aware, for the past 6 years Congress has helped fend off several assaults on the antitrust laws which deal with resale price maintenance or vertical price fixing.

We view the elimination of treble damages in vertical cases as another attempt to bury the law which was passed by Congress against resale price maintenance. We once again have Federal agency officials espousing unproven economic theories as a basis for changing the law.

The economic theory contrasts sharply with the view taken by the Congress, by the majority of economists, by any businessman who is in the real world of economics.

Congress repealed the fair trade law and made resale price maintenance a per se violation in all cases. Any change hurts the consumer and hurts small business.

We, as businessmen, are confused. Exhaustive data presented to Congress substantiated that price fixing was harmful to the consumer and businesses. Yet, Federal agency officials continue to espouse unsubstantiated economic theories based on how they would like the market to behave rather than on the realities of the market itself.

Our industry believes that continued efforts by the Justice Department and the FTC have subjected price-competitive retailers, large and small alike, to increasing anticompetitive pressure.

The long established, absolute prohibition against resale price maintenance with treble damages has shaped the competitive structure for the distribution of goods in the United States.

Due to this absolute prohibition against price-fixing agreements, sellers have been aware of their limits on their power with respect to their consumers' pricing decisions. Buyers have understood that if they suffer harm as a result of resisting a manufacturer's attempt to fix resale prices, as we have done, they have potent legal remedies available that make their opposition to illegal action economically feasible, while if they join in price-fixing schemes, they risk civil and criminal penalties.

As the gentlemen before have stated, the agencies have done nothing, or practically nothing, on resale price maintenance in the last six years. We have been told by Mr. Miller when he was in charge of the FTC that, if you think you have a case, go to court civilly and you can get treble damages; that is a deterrent. Now, the administration wants to take away that deterrent.

The proposal before you will be another nail in the coffin of free competition, and protections against illegal price fixing. Our attorneys inform us that no one, except in the most unlikely circumstances, will be able to sue a competitor for treble damages, even in situations where the grossest forms of horizontal price fixing take place.

Competitive victims of vertical price fixing—the antitrust violation which most directly threatens our industry—will be reduced to recovering merely single damages, thus further weakening our ability to protect ourselves from business harm.

In effect, it licenses or encourages people to break the law. What have you got to lose? Go ahead; if you get away with it, fine. If not, what have you lost?

In my written text, we pointed out to the committee several inherent contradictions between the contents of the package and previous pronouncements by the administration and the attitude of the courts regarding the issue of treble damages.

I do not maintain that there may not be some strange, specific instance in which it would be appropriate to refrain from automatic trebling. But in the overall majority of cases that affect the consumer and small business, this is not true.

Why should we throw the baby out with the bathwater because there may be some exception that may affect big business' interest? Here, we are confronted with a measure that would destroy the small businessman. As it is, because the agencies are not enforcing the law against resale price maintenance, it is incumbent on small business to sue. The cost of this is very, very expensive.

Burlington has spent over $750,000 in the last 6 years, and most of the cases are still tied up in discovery because big business hires big firms who stall and stall and stall. It is really a killer to the small businessman.

There have been, over and over, cases where the intervention of the Justice Department on behalf of the special interest groups against the consumer and the small businessmen has affected decisions by judges.

The real crux of what this bill is—it is a special interest bill for big business against American consumers and small business. It is soft on companies that are convicted of overcharging the consumer of millions of dollars and eliminating competition.

I therefore ask that this bill be killed once and for all, and let Congress reassert the laws that they made and let them not allow any agency to change the laws that they have made. It is an insult to the Congress, it is an insult to the American consumer, it is a destructive force to small business.

[The prepared statement and responses to questions follow:]

TESTIMONY

OF

ASSOCIATION OF GENERAL MERCHANDISE CHAINS

Presented by:

Monroe G. Milstein
President
Burlington Coat Factory Warehouse Corporation

Mr. Chairman, members of the Committee, I am Monroe G. Milstein, President of the Burlington Coat Factory Warehouse Corporation, headquartered in Burlington, New Jersey.

I have been Chairman of the Board, President and a director of the Burlington Coat Factory Warehouse since 1972. Prior to 1972, I was president of Monroe G. Milstein, Inc. (MGM), a wholesaler of outerwear located in New York and a wholly-owned subsidiary of the Burlington Coat Factory Warehouse.

I am here today on behalf of the Association of General Merchandise Chains, Inc. (AGMC), which represents the nation's price-competitive general merchandise retail industry, including the Burlington Coat Factory Warehouse. AGMC's membership includes retail companies that operate more than 20,000 discount, variety, dollar, junior department, family center, off-price, factory outlet, catalog showroom and other general merchandise stores. These companies vary in size and include many of the nation's largest retail chains as well as companies active in one or more regions of the country. AGMC member company stores are located in all 50 states and account for over $50 billion in annual sales.

I come before you today to voice my grave concern over the impact on our industry that will result if Congress adopts the Administration's proposal to "de-treble" resale price maintenance (or resale price-fixing).

The Burlington Coat Factory Warehouse was begun by my father, Abe, as a wholesale coat business in 1924. This enterprise led us into retailing in 1972, the year we bought the old Modcraft factory outlet on Route 130 in Burlington, New Jersey.

Following the 1975 repeal of the so-called "fair trade" laws, which the Chairman and this Committee recognized as being very important to the welfare of consumers, my company has grown from one retail outlet to a present total of 82 stores throughout the nation. Such growth would have been impossible if the old laws which permitted resale price maintenace had not been struck down by Congress. But today, our continued growth and viability are threatened on several fronts.

From 1976 to 1980, after the repeal of "Fair Trade" laws, Burlington Coat Factory experienced less than a dozen attempts of price-fixing. We believe this was due to both the enforcement policies of Federal officials and the financial deterrent of treble damages. However, in 1980, former Assistant Attorney General Baxter and former FTC Chairman Miller began an assault on the antitrust laws which deal with resale price maintenance. I understand that they view retail price maintenance as beneficial, supposedly because it helps promote the sale of complex technological products, or products that require relatively large amounts of point-of-sale service. Under this theory, it is argued, retail price maintenance promotes entry into some lines of business, and potentially increases competition. Why matters related to high technology fields should apply across the board to industries such as apparel, where no high technological services are needed, is a mystery to me.

This economic theory contrasts sharply with the view taken by the Congress with the benefit of careful study of actual marketplace conditions, expressed when Congress repealed the "fair trade" laws, and more recently on several occasions when Congress has expressly forbidden the Federal antitrust agencies from attempting to overturn or undermine the law which makes resale price maintenance a per se violation of antitrust laws.

Over the past five years, the Justice Department and the FTC have not only clearly refused to enforce the law, but have also attempted to change the existing antitrust laws on price-fixing. Even though Congress found it necessary to restrict the Justice Department's appropriations so that it would not alter or change the existing per se rule on retail price maintenance, that did not deter the Antitrust Division from coming forward with the much criticized "Vertical Restraint Guidelines." The Justice Department's Guidelines provided a novel, and very dangerous, new interpretation to the antitrust laws on price-fixing. Congress and the state Attorneys General were outraged, and in a bipartisan effort reinstated the appropriations restriction and called for the Justice Department to withdraw the "Vertical Restraints Guidelines."

What we, as businessmen, have found confusing is that the empirical data, as presented to Congress when it repealed the "fair trade" laws, which allowed resale price-fixing at the State level, substantiated that:

- Consumers paid 10% to 27% higher prices in states that allowed price-fixing than in states that excluded price-fixing.

- Fewer new businesses entered the marketplace in states that allowed price-fixing than in states that excluded price-fixing.

- More businesses failed in states that allowed price-fixing versus those states that excluded price-fixing.

Resale price maintenace also:

- Denies to consumer the ability to choose the level of service they want.
- Is an umbrella that protects inefficient producers.
- Facilitates agreed upon pricing by manufacturers.
- Serves only to increase prices to consumers.

Yet Federal officials continue to espouse economic theories based on how they would like the market to behave, rather than on the realities of the market itself.

We strongly believe in the rights of the consumer. We believe that it is important for you to understand our industry and why we have decided it is important to oppose the weakening of the antitrust laws.

Our industry believes that continued efforts by the Justice Department and FTC has exposed price-competitive retailers, large and small alike, to increasing examples of pressure.

Retailing is a diverse, dynamic, and constantly changing and developing industry. It responds and adapts to changes in the economy, in technology and in society. Department stores, specialty stores, variety stores, discount stores, catalog stores, off-price stores -- all represent innovations in merchandising that arose to meet the consumer demand and offer their own special combination of competitive factors, among them price, selection, location, hours, convenience, availability of credit and others.

It may not be the manufacturer who established the retail price of the goods, but rather his powerful retail customers, usually one or more full-price store chains. Traditionally, full-price stores employed a markup of "keystone" plus 10 percent or 20 percent, "keystone" being the industry term for double the wholesale price. These traditional full-price stores have found, particularly in the area of apparel sales, that their less efficient operation and approach require them to achieve an overall high gross margin.

They are either unwilling to, or incapable of, cutting their costs to meet the competition of the new breed of value-oriented merchants, like the Burlington Coat Factory, who are capable of selling the same branded merchandise at a lower markup. As value-oriented merchants, (meaning discount, off-price or outlet stores), we purchase the identical brand goods -- at the same time -- from the same sources as do the full-price stores. We have, however, managed to effect operational savings which enable us to offer the same goods at lower prices.

Generally, we have found that many manufacturers are only too happy to sell to our industry because we move more of their merchandise quicker and increase the manufacturer's profit. The problem arises when the full-price store must shave its prices to meet our competition and cannot achieve their desired gross markup due to their inefficiencies. It is at this point that the higher-priced distributors put pressure on the manufacturers either to fix prices or cease doing business with competitive value-oriented retailers like us.

We believe that the proposed changing of the treble damages law is a "back door" approach to once again encourage resale price maintenance. The competitive structure for the distribution of goods in the United States has been shaped not only by the long-established absolute prohibition against resale price maintenance, but also by the availability of treble damages for businesses damaged by price-fixing attempts.

One bill (S. 2162) in the Administration's antitrust "reform" package would completely change this. Burlington Coat Factory's attorneys inform us that, as a practical matter, virtuallly no one will be able to sue a competitor for treble damages, even in situations where the grossest forms of horizontal price-fixing takes place. Competitive victims of vertical price-fixing -- the antitrust violation which most directly threatens our industry -- will be reduced to recovering merely single damages, thus further weakening our ability to protect ourselves from business harm.

There are several inherent contradictions between the proposal to end treble damages in resale price maintenance cases and past pronouncements by the Administration that we believe should be pointed out to the Committee.

First, former FTC Chairman Miller and other FTC officials have appeared before Congress on numerous occasions to testify on resale price maintenance. On numerous occasions, former FTC chairmen have attempted to justify the agency's total absence enforcement actions on resale price maintenance by pointing to the deterrent of private treble damage actions.

November 9, 1983, in oversight hearings on FTC enforcement, before the House Government Operations Subcommittee on Commerce, Consumer and Monetary Affairs.

Rep. Coleman: From the testimony we had this morning, I have sensed some concern on the part of small businesses that they cannot count on the Commission to utilize administrative law procedures in enforcing current law.

Mr. Miller. "Yes. Well, you know, you put your finger on an important thing. It is unfortunate, I think, that some people, perhaps, reading things in the press have been misled to think that the Commission might not be enforcing certain kinds of laws. That is not true. Keep in mind that the number of private lawsuits alleging resale price maintenance has always by far exceeded the number of public lawsuits. The reason for this, private parties can get treble damages, and have that as an incentive if they think they have been hurt by resale price maintenance.

February 22, 1984, in FTC oversight hearings before the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism.

Mr. Miller. "And also, if I didn't mention it before, I think we hardly need to go any further on the question of what the beef is here with Burlington Coat. I noted last year in testifying before you, if there were really an antitrust violation, surely it is in Burlington Coat's interest to go the private litigation route because they could get treble damages."

April 16, 1985, in hearings on FTC reauthorization, before the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism.

Acting FTC Chairman Calvani: "First, the principal reason why there are not more cases brought by the federal antitrust enforcement agencies alleging illegal resale price maintenance is that there are few cases to be brought. The vast majority of firms comply with the law and do not engage in practices that could easily be attached as resale price maintenance. It would be surprising if it were otherwise. Some point to the substantial number of horizontal collusion cases that have been brought in recent years and asks why the same cannot be said of vertically imposed resale price maintenance. The analogy, however, is inappropriate. One, i.e., horizontal collusion, is covert. The other, vertically imposed resale price maintenance, must be announced. Thus, a firm, in order to implement an illegal policy of resale price maintenance, must announce to its customers that it intends to violate the law -- which constitutes both a felony and gives rise to treble damages. Not surprisingly few firms do so."

It does not take a great deal of expertise to see that treble damages help deter price-fixing and removing treble damages would help promote price-fixing. I understand that the Supreme Court has many times spoken of private treble damage suits as most effective weapon in antitrust enforcement.

I do not maintain that there might not be specific instances in which it would be appropriate to refrain from automatic trebling. For instance, upon recognizing that treble damages might be a particular problem in joint research and development, Congress addressed the issue by passing legislation covering that specific problem.

However, the proposal to de-treble resale price maintenance and a variety of other trade restrictive practices reminds me of amputating an arm because the patient may have a hangnail. There is no effort to address specific problems. If the Justice Department is aware of specific matters, where it can be shown that de-treble damages is inappropriate, then it is incumbent upon the Department to come forward with them. But there have been no specific examples of specific harm, nor any remedy suggested that would be limited to the narrow ranges of cases at issue. Instead, it is proposed to de-treble damages in a wide range of cases without any analysis. In one clean cut, this proposal would redefine the nature of what is considered anti-competitive, and in the process, asks the Congress to designate as potentially pro-competitive such practices as resale price maintenance and "tying" which courts have clearly and repeatedly condemned as anti-competitive.

Administration officials have already been provided ample opportunity in appearing before this Committee and elsewhere to give concrete examples demonstrating where treble damages specifically has inhibited pro-competitive activities. Instead of offering concrete particulars based on empirical evidence from the marketplace, they instead merely rehash academic theories. The consumer and business community cannot operate effectively in the marketplace while Federal officials constantly inject uncertainty in their attempts to establish some economic theory that has no relevance to our industries.

In its earlier hearing on S. 2161, even the distinguished witnesses there were not able to provide this Committee with concrete examples of how the treble damage remedy prevents anyone from competing in our industry, or anywhere else for that matter. Not only has there been no showing that pro-competitive activities are being stifled, but in fact the exact converse is true. The policies and non-enforcement of the law by Federal enforcement officials, together with the confusion of evidentiary standard requirements following Monsanto, has produced a record over the past five years that shows ever-shrinking deterrents to anti-competitive behavior.

Like other members of the fast-growing off-price retail industry, Burlington Coat Factory has worked extremely hard to build itself from a single store little more than a decade ago to a nationally recognized company giving selection and favorable prices to the consumer. I am most fearful for our industry because of Federal non-enforcement and because, following the Monsanto decision, summary judgments and directed verdicts are becoming the rule, rather than the exception, in vertical antitrust cases. Burlington Coat has managed to weather the storm so far, but if treble damage actions against attempted resale price-fixing are removed from us, there will be very few, if any, new businesses that will be able to grow like we have. Consumer choice and ability to obtain genuine bargains will also suffer.

Moreover, adverse, post-Monsanto decisions are already discouraging our members from seeking judicial relief from anti-competitive practices. Although my remarks today are addressed to the remedies portion of the package, I am aware that legislation is also under consideration to clarify the Monsanto evidentiary standard which, if passed, would result in many more meritorious cases reaching the jury. I believe that such legislation is of the utmost importance.

I submit that if Congress were so unwise as to approve the present attempt to emasculate the antitrust laws further, vertical price-fixing will greatly increase. Removal of the treble damage remedy could, for all practical purposes, eliminate any effort by businesses such as Burlington Coat Factory to obtain redress and will leave many small businesses virtually defenseless.

People like myself would have to think long and hard whether or not it would be worth the time and money to pursue price-fixers if the prospect of treble damages is removed. It is difficult enough, given the present climate, trends in the law, and the lack of Federal enforcement to prevent anti-competitive practices. To allow the elimination of treble damages in most cases is a contradiction of everything that Congress has stood and fought for during these past few years.

I would, therefore, respectfully request that this Committee not allow the Justice Department to sanction a "back door" method to exonerate price-fixers and other antitrust violators.

Another disturbing aspect of the legislation is its provision for attorney's fees in favor of the defendant which, I am informed, will hold an antitrust plaintiff to a higher standard of case in bringing suit than applies to other plaintiffs. I understand that there are already rules and standards which provide strict sanctions against frivolous lawsuits, and that the courts are enforcing them. To hold an antitrust plaintiff to an even higher standard than other plaintiffs would directly contradict the long-standing policy of Congress and the courts to give antitrust cases more encouragement than is provided in areas which are critical to the economy.

Thank you very much, Mr. Chairman and Members of the Committee, for giving me this opportunity today to address you on behalf of my industry on this extremely important issue.

RE: S2162

ANSWER TO QUESTION NO. 1 BY SENATOR THURMOND:

1. Do you believe that the Administration's proposal to provide treble damages in overcharge situations but actual damages to competitors would deter the worst antitrust violations while encouraging aggressive competition by reducing harassment suits?

We certainly do not believe that the Administration proposal to provide treble damages in overcharge situations but merely actual damages to competitors would deter the worst antitrust violations while encouraging aggressive competition by reducing harassment suits. In the first place, we can conceive of numerous hardcore antitrust violations which would directly harm competitors but which would be unlikely to result in the filing of lawsuits by persons who have been overcharged. For example, we doubt that even the present Administration would disagree that the following scenario would present a flagrant violation of Section 2 of the Sherman Act: A hypothetical manufacturer enjoys a 95% monopoly in a line of commerce. A new entrant, with limited resources and lacking in a distributional system or means of obtaining suppliers, attempts to enter the market with a product which is a superior to that produced by the defendant holding a monopoly in the industry. Rather than improve its own products, the monopolist determines to destroy the new entrant in its infancy by using its market power to cut-off sources of supply to the new entrant as well as interfering with its attempt to set up a line of distribution and to obtain necessary financing. In addition, the monopolist drops its own prices below cost until the new entrant is bankrupted. Since the new entrant did not purchase anything from the monopolist and was in fact a potential competitor thereof, he would not be entitled to treble damages under the proposed amendment. Since the monopolist actually dropped its prices below cost for so long as it took to drive the new entrant from the field, no one was overcharged by his activities. Thus, the bankrupted victims of the monopolists practices is in the position of having to persuade his creditors to finance and antitrust case which, if all goes well, will result only in the recovery of lost profits. Faced with the dilemma of risking a bird in the hand (i.e., liquidating the victim's existing assets) or embarking on the speculative course of financing an antitrust claim, many creditors would decide to forego litigation if the most that could be hoped for would be a recovery of single damages. Thus, any deterrents to the monopolist to engage in the activities discussed would be reduced by a factor of three.

Moreover, even the Department of Justice regards horizontal price fixing as indisputably anticompetitive. It is also easy to hypothesize a situation in which horizontal price fixing could occur in which no one would be able to seek treble damages. Assume that there are five entities in a given market. Four of these entities agree to charge prices below cost for so long as is necessary to drive the fifth component of the market into bankruptcy. Again, just as in the monopolistic case discussed above, no one would be overcharged since the conspirators priced their goods below cost during the conspiracy. The victimized competitor would, as in the scenario above, be in the position of attempting to persuade his creditors to underwrite an expensive and complex antitrust suit with the mere prospect of obtaining single damages.

We would be happy to supply further hypothetical situations in which the most egregiously antitrust violations would expose the malfactors to nothing more than single damages. However, we believe that the foregoing fact patterns should suffice for the purpose of completely undermining the Government's position that only antitrust violations which result in overcharges are clearly anticompetitive and require the extra degree of deterrence given by treble damage awards.

Moreover, we could not disagree more with the Government's ill-considered assumption that antitrust violations which do not result in overcharges might in fact be based on activities which are procompetitive and the challenges to such activities are "harassment suits". In the first place, as the examples above amply demonstrate, there are many blatant, hardcore violations of the antitrust laws which do not result in overcharges. Moreover, even where overcharges have occurred as a result of an antitrust conspiracy, it is frequently the case that only a competitor would have sufficient inducement to sue for damages. If, for example, a manufacturer agreed with numerous of its distributors to maintain high retail prices in blatant violation of Section 1 of the Sherman Act and to refrain from doing business with any distributor or retailer who departed from the conspiratorial price, the total amount of overcharges in the industry, although large in the aggregate, might not be of great impact to any individuals other than competitors injured by the conspiracy. If the item in question was toothpaste and it developed that retailers who adhered to the conspiratorial price were overcharging their customers five cents per tube of toothpaste, few consumers would be inclined to file an antitrust case to obtain the total amount of the overcharges even if trebled. (Although state attorney generals can sue on behalf of the victimized public in *parens patriae* cases, no state in the Union has the resources to pursue every vertical price fixer.) The only private individuals with the incentive to sue under such circumstances would be competitors of the distributors and retailers who were terminated because they refused to go along with the conspiracy. To induce such persons to vindicate their rights and Congressional policy under the antitrust laws, Congress has seen fit to award such antitrust victims three times their ultimate recovery. One does not need to have an economics degree from the University of Chicago or a PHD in higher math to conclude that the incentive to sue under such circumstances is greatly increased, affording the plaintiff the opportunity to recover three times his loss.

In addition, in many vertical price fixing cases, the retailers who withdraw from the conspiracy and thus lose the line in question are put out of businesses as a result. Again, even if such persons were inclined to seek single damages, they would have to persuade their creditors and perhaps a bankruptcy court as well to underwrite their lawsuit. The absense of a tripled remedy would certainly weigh against such an investment of time and money on the part of the victims' creditors.

Finally, we are unaware of any data which indicates that business entities have refrained from taking "procompetitive" activity because they fear a treble damage recovery by their competitors. None of the panelists even gave examples of instances where this has occurred. (We submit that their failure to do so should be enough to defeat the bill since the burden of proof is squarely upon the Government if it wishes to effectuate a change in seventy years of antitrust policy.) Moreover, the Government not only fails to come forward with instances of potentially procompetitive activities which are stifled by fear of antitrust suits by competitors, it, perhaps unwittingly, has begged the entire question of what is competitive and what is procompetitive. Without an amendment to the Constitution, acts which are anticompetitive are the acts which Congress has specifically condemned or which, in interpreting the congressional mandate, the Supreme Court and the Federal Judiciary have found to violate the antitrust laws. It is inherent in the Government's position that congress and the courts are wrong and do not know what is competitive or anticompetitive in many unspecified instances. If the Government really had a basis for rightfully assuming the inaccuracy of the views of the Federal Judiciary and Congress, we would assume that they would come forward with a package that would completely modify that antitrust laws as they exist and overrule numerous cases to the contrary.

Finally, the Government takes the implicit view that most lawsuits by competitors are "harassment suits". Here, too, no data is presented for this bold assumption. It provides this Body with no indiction that there are business entities who are refraining from taking steps because they anticipate "strike suits" by competitors. We suggest that if such data existed, the Government would be forthcoming about it with this Committee. The simple fact of the matter is that antitrust cases, even with the treble damage remedy, no longer have the *in terrorem* effect that they had in years gone by. Today, as the Georgetown study shows, more than half of the summary judgment motions brought on behalf of defendants are granted. The Georgetown study further shows that 12 percent of antitrust suits are disposed of by summary judgment or other motions to dismiss. In addition, Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. 1927 provide a stiff deterrent to any person bringing a lawsuit which has no basis.

Given these factors, and the absense of any data to the contrary offered by the Government, we believe it ignores reality and the trends in the law to believe that there are numerous honest members of the business community who are refraining from taking legitimate procompetitive action for fear of the treble damage remedy. If a lawsuit is truly frivolous, the trend in the law is to dismiss it early in the proceedings on a motion for summary judgment and, perhaps, to award attorneys' fees to the prevailing defendant. In addition, the Justice Department and the FTC have, for all practical purposes, ceased prosecution of numerous types of violations long held to be without any redeeming merit. We thus firmly believe that few, if any, business entities are refraining from competitive innovation because they fear that frivolous lawsuits will be brought against them by competitors and the Government has to date shown nothing to the contrary.

ANSWER TO QUESTION NO. 2 BY SENATOR THURMOND:

2. Do you agree with the Administration that the Federal Government should recover treble damages in civil suits?

Contrary to the position taken by some of the panelists to the effect that there was no need for treble damage recoveries by the United States Government because the Government is obliged to enforce the antitrust laws and therefore does not need the incentive of treble damages, we believe that giving the United States the prospect of a trebled recovery is supported by strong policy considerations. As is well known to the Committee, the Justice Department has been less than zealous in pursuit of antitrust violators. At least one of the supposed reasons for the cutback on antitrust enforcement is the general view of the Administration that cost of government regulation should be minimized. If the government were able to obtain treble damage remedies, successful investigations and civil suits might defray many of the Department of Justice's expense in enforcing the law. This would certainly be of some assistance to both the Government and to the taxpayer.

In addition, it is paradoxical indeed that opponents of this measure have taken the view that, since it is the Government's obligation to pursue antitrust violators, the Government requires no added incentive to bring such actions. We believe that the Government's record of non-enforcement shows that, for whatever reason, the Justice Department has lacked sufficient motivation to pursue violators with the same degree of vigor as has been the case in the past. We therefore believe that public policy supports any measure which would give added incentive to the Government to pursue antitrust violators who have victimized the Government.

With respect to the deterrent effect that such treble damages may have, we point out that there have been numerous instances in the past few years where it has come to light that the Government was overcharged by suppliers. It may prove that some future overcharges violate provisions of the antitrust laws. At present, such overchargers, if apprehended, would face (under the antitrust laws) only a dollar per dollar return of their illgotten gains. We submit that there would be significant added deterrent effect if unscrupulous contractors faced the additional prospect of disgorging three times the Government's injury in the case of overcharges which violate the antitrust laws.

Senator **Grassley**. Mr. Long.

STATEMENT OF THOMAS R. LONG

Mr. **Long**. Mr. Chairman, I am Thomas R. Long, senior vice president and general counsel of Westvaco Corp. I am testifying this morning as a member of and on behalf of the NAM. We appreciate the opportunity to testify on this important subject.

First, picking up on some remarks made by the other witnesses, I do not think we should assume that the lack of antitrust cases is bad news. Sure, it is bad news to the lawyers that have brought and defended those cases. But from the overall interests of the country, I think it is good news.

In my experience, the business community is very sensitive now to the antitrust laws, and it is a high degree of compliance that causes the lack of cases, not a lack of enforcement.

In the antitrust field, the issue of remedies is as important as substantive antitrust laws. For some time, and increasingly so in recent years, it has become apparent that some adjustments needed to be made

The present system, for the reasons stated in my prepared remarks, is punitive and unfair in its operation. S. 2162 contains certain provisions that will start the process of bringing about some badly needed reforms, all of this without, in my opinion, undermining the fundamental goals of the antitrust laws.

With respect to treble damage reform, the NAM strongly supports the detrebling provisions. These provisions would eliminate the automatic use of treble damages, but would preserve trebling in situations involving price fixing, market division, and bid rigging. These are the types of cases which exhibit the most socially offensive conduct.

The imposition of treble damages is in the nature of a fine; it is punitive in nature. It seems to me it is fundamentally unfair to impose such a penalty in cases where the defendant believed it was acting lawfully or in cases which are, in reality, ordinary commercial disputes.

To impose treble damages in a case involving ambiguous conduct merely gives the plaintiff a windfall or leverage to extract settlements. The prospect of automatic treble damages in those types of situations has, without a doubt, caused companies to steer away from competitively aggressive and socially beneficial practices. Thus, I believe the proposal is procompetitive.

In my opinion, the elimination of treble damages will have little or no effect on the incentive of plaintiffs to undertake antitrust litigation. Trebling will be available in those cases involving especially egregious conduct, and an actual remedy, plus attorneys' fees, is a considerable incentive to undertake litigation in other types of cases.

Experience has shown that in other areas of the law where only actual damages are allowed, there is no shortage of plaintiffs or lawyers willing to work on a contingent fee basis.

In my opinion, detrebling, as contemplated by S. 2162, will have little or no effect on deterrence.

Picking up on a point that Judge Bell made about people being different and conduct being different, we suggest the committee give consideration to allowing the court to recognize degrees of culpability and degrees of participation, and have some discretion to award less than treble damages in the overcharge and undercharge cases.

We also suggest that the legislative history provide some guideposts to help the courts interpret the meaning of the overcharge/undercharge standard.

With respect to defendants' attorneys' fees, the NAM supports the concept of awarding costs, including a reasonable attorney's fee, to substantially prevailing antitrust defendants upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.

It should be recognized that this is a very tough standard, but at least it is a step in the right direction. If prevailing plaintiffs obtain legal costs, why not prevailing defendants?

Awarding attorneys' fees to prevailing defendants will be an important deterrent against the abuse of the litigation process. It would be helpful if the legislative history for S. 2162 sent a strong signal to the judiciary to make use of the provision.

There is a similar provision under rule 11. The judiciary has not seen fit to use that provision very often.

The NAM urges the committee to consider whether it is appropriate to automatically award attorneys' fees in actual damage cases. We believe restoring the American system requiring each party to pay its own costs may be more appropriate.

I will comment only briefly on claim reduction. We urge prompt passage of S. 1300, as amended by the chairman.

With respect to automatic prejudgment interest, the NAM does not support this provision. Prejudgment interest on antitrust damages is currently limited, for very good reason. The potential for abusive delay by plaintiffs, combined with the extensive time required for antitrust disputes to be resolved, could result in potentially business threatening damage amounts and coercion by plaintiffs.

Automatic prejudgment interest is generally not available. It is not the prevailing rule currently in commercial litigation, and I can think of no good reason to make antitrust an exception.

The proposal contained in S. 2162 should also be scrutinized from a drafting standpoint. Antitrust cases are complicated. They deal with a variety of claims occurring over time. Awarding interest from the date of first injury could produce either a large amount of over compensation or a large degree of complexity and uncertainty in the case.

Antitrust litigation would take on another element of gamesmanship and become even more of a business enterprise. Lastly, requiring prejudgment interest would remove any incentive on plaintiffs to detect and bring to conclusion antitrust disputes at an early date.

The NAM does not support permitting the United States to recover treble damages. The Federal Government should need no incentive to enforce the law. It has the obligation, it has the resources. It already has a substantial advantage over private enforcement. The prospect of heavy fines and jail time promotes deterrence. Additionally, a convicted party can be barred from doing business with the Government.

I apologize; I have a very bad cold and I will try to get through this.

There is simply no demonstrated need for extending the treble damage remedy to the Federal Government.

That ends my testimony. I will be happy to answer questions.

[The prepared statement and responses to questions follow:]

TESTIMONY
OF
THOMAS R. LONG

ON BEHALF
OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, members of the Committee, I am Thomas R. Long, Senior Vice President and General Counsel of Westvaco Corporation. I am testifying this morning as a member of and on behalf of the National Association of Manufacturers (NAM).

The National Association of Manufacturers is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ approximately 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council. Our members are active supporters of our antitrust laws and believe that these laws are the cornerstone of our competitive economic system. Our membership consists of companies that have been involved in antitrust litigation, some as plaintiffs and others as defendants. The NAM appreciates this opportunity to appear before the Committee today to testify on S.2162, the Antitrust Remedies Improvement Act of 1986.

In the antitrust field the issue of remedies is as important as substantive antitrust law. For some time and increasingly so in recent years, it has become apparent that some adjustments need to be made. The present system is punitive and unfair. A number of factors coalesce to cause almost unlimited exposure to liability. The more significant are: mandatory treble damages regardless of culpability, a "preponderance of the evidence" standard of proof rather than a "beyond a reasonable doubt standard" normally associated with punitive awards, the ability to bring nationwide class actions, a vague and open-ended statute of limitations because of the doctrine of fraudulent concealment, the use of "soft" evidence of conspiracy and damages, consideration of exceedingly complicated business and economic evidence by lay jurors, high cost of litigation because of limitless discovery, a system which provides the plaintiffs' bar with an incentive to run up legal fees, the rule of joint and several liability which allows plaintiffs' lawyers to make "sweetheart deals" and "whipsaw" innocent defendants to settle, and lastly, a system which has no deterrent and in fact offers an incentive to sweeping even innocent companies into the litigation and engaging in extensive expensive discovery tactics. This powerful engine of private enforcement, of course, is backed up by a criminal prosecution system calling for heavy fines and jail time.

S.2162 would start the process of bringing about some badly needed reforms, without in my opinion undermining the fundamental goals of the antitrust laws. In summary, the NAM supports the detrebling, attorneys' fees for a prevailing defendant, and claim reduction (the amended version). However, the NAM does not support changes in prejudgment interest or treble damages in federal government actions.

Treble Damage Reform

NAM strongly supports the treble damage reform provisions of S.2162. These provisions would eliminate the automatic use of trebling but would preserve trebling in situations involving pricefixing, market division, and bidrigging, the types of cases which exhibit the most socially offensive conduct.

The imposition of treble damages is in the nature of a fine and punitive in nature. It's bad enough to impose such liability using a "preponderance of the evidence" standard of proof but it is fundamentally unfair to impose such a penalty in cases where the defendant believed he was acting lawfully or in ordinary commercial disputes. In those types of cases automatic trebling merely gives a plaintiff and his lawyer leverage and a windfall.

The present system is of great concern to U.S. manufacturers. It may deter desirable, procompetitive activity simply from an overabundance of caution. For example, aggressive low-pricing or innovative distributional practices may be deterred. Trebling of damages for these cases can cause companies to steer away from competitively aggressive and socially beneficial practices. The threat of treble damages now can be used to coerce competitors into abandoning and restricting conduct and arrangements which may enhance efficiency and lower prices to consumers. Congress has already addressed the adverse impact of misapplied treble damages in the Export Trading Company Act of 1982 and the National Cooperative Research Act of 1984. Extending the rationale of reform under those Acts to antitrust law generally would be both equitable and competitively beneficial. In my opinion, the elimination of treble damages as contemplated by S.2162 will have little or no effect on the incentive of plaintiffs to undertake the risk and expense of antitrust litigation. An actual damage remedy plus attorneys' fees is a considerable incentive. Experience has shown in other areas of the law where actual damages only are allowed, there is no shortage of plaintiffs or lawyers willing to work on a contingent-fee basis.

In my opinion detrebling as contemplated by S.2162 will have little or no effect on deterrence. Deterrence continues to arise from criminal and civil penalties available under federal and state law to the extent they might be applicable to the type of behavior not requiring the imposition of treble damages. In the real world of business, deterrence arises from the overall cost of litigation, the business disruption and uncertainty litigation imposes, and the stigma carried by allegations of certain behavior, not the prospect of treble damages.

Treble damages should be applied only to clearly harmful conduct such as covert cartel behavior and not broadly or automatically applied to behavior which may be economically beneficial. But, it is impossible to anticipate all of the possible fact situations in which a plaintiff might seek to recover an "overcharge" or an "undercharge." NAM recommends the detrebling proposals of S.2162 be amplified by giving the courts the discretion in treble damage cases, (those involving overcharges or undercharges) to award less than treble damages where justice would be served.

Defendants' Attorneys' Fees

NAM supports the concept of awarding of costs, including a reasonable attorney's fee, to a substantially prevailing antitrust defendant upon a finding that the plaintiff's conduct was "frivolous, unreasonable, without foundation, or in bad faith." This is a tough standard but at least a step in the right direction. In my opinion, the proposed change would help achieve the goal of protecting law-abiding defendants from baseless and bad-faith attacks without undermining private enforcement of the antitrust laws. Awarding attorneys' fees to prevailing defendants will be an important deterrence against abuse of the litigation process. Such abuse can take the form of "strike suits" used to coerce a settlement from a defendant for an amount calculated to be less than the defendant's anticipated litigation costs. The present system of sanctions available under Rules 11 and 37, as a practical matter, has not been used to any great degree by the courts to award attorneys' fees to prevailing defendants. It would be helpful if the legislative history for S.2162 sent a strong signal to the Judiciary to grant attorneys' fees to prevailing defendants.

NAM urges the Committee to study whether it is appropriate to automatically award attorneys' fees in those cases where treble damages are not allowed. It may well be that the American system requiring each party to pay its own cost of litigation is more appropriate.

Claim Reduction

The record before this Committee is extensive and it is clear some remedy is needed to mitigate problems caused by the application of joint and several liability in antitrust cases. NAM again, as it stated in its April 15, 1986 statement, believes that claim reduction alone, while offering some relief will still result in unfairness, complexity and delay. NAM strongly supports Senator Thurmond's amendment to S.1300 which utilizes the best of the claim reduction approach contained in S.2162 and urges prompt passage of S.1300. Such an important reform should not await consideration of the other antitrust remedies being considered.

Automatic Prejudgment Interest

NAM opposes section 201 of S.2162 which provides for automatic prejudgment interest in actual damage cases. Prejudgment interest on antitrust damages is currently limited for very good reasons. The potential for abusive delay by plaintiffs combined with the extensive time required for antitrust disputes could result in potentially business-threatening damage amounts and coercion by plaintiffs. This could negate much if not more than all of the benefit of the Act's detrebling provisions. Antitrust defendants should be allowed to defend themselves on the merits. Prejudgment interest, given the circumstances of antitrust litigation, would seriously impair this right.

Prejudgment interest is generally not the prevailing rule in a litigation context. The proposed statute should be carefully tested to see how it works in practice. It seems to imply that interest would be payable on actual damages from date of injury. If this means the total award, then there is a large element of overcompensation involved. If on the other hand it means that interest will be awarded as the damages are incurred (on a daily or transactional basis), then a tremendous element of complexity and uncertainty will have been added to the case. Antitrust litigation will become even more of a business enterprise with litigation decisions being made on a relative return basis. There will be no incentive on plaintiffs to detect and bring to conclusion antitrust disputes at an early date.

Treble Damages in Federal Government Action

NAM opposes section 202 of the bill which amends section 4A of the Clayton Act to permit the United States to recover treble damages when injured by reason of having been overcharged or underpaid by an antitrust violator. The federal government should need no incentive to enforce the law. It has the resources to prosecute antitrust violations on both a criminal and civil basis. It has a substantial advantage over private enforcement. Heavy fines and jail time promote deterrence. The availability of fines and actual damages provide compensation. Additionally, a convicted party can be barred from future contracts with the government. There is simply no demonstrated need for extending the treble damage remedy.

Additional Antitrust Reform Required

NAM would also like to express support for other important bills in the Administration's antitrust package. NAM urges passage of the Merger Modernization Act of 1986, S.2160, and the Interlocking Directorate Act of 1986, S.2161. We believe that these bills include reforms that are sorely needed to update antitrust law. NAM also urges passage of the Foreign Trade Antitrust Improvement Act of 1986 with amendments designed to make the judicial factors of section 3 nonexclusive, to give the courts more discretion to detreble damages and to request the views of the U.S. Attorney General.

* * * * *

In summation, Mr. Chairman, NAM supports treble damage reform, awarding attorneys' fees to prevailing defendants, and claim reduction as amended, but does not support changes in prejudgment interest or treble damages in federal government action. We applaud the effort that has gone into developing S.2162 by this Committee and the Department of Justice. NAM and its members look forward to working with you on this important and necessary endeavor to update and modernize the antitrust laws.

Mr. Chairman, this ends my testimony and I would be happy to answer questions members of the Committee may have.

Westvāco

May 21, 1986

Senator Strom Thurmond, Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

Following are my written responses to the questions submitted on behalf of yourself and The Honorable Arlen Specter, contained in your letter of May 7, 1986, concerning S. 2162.

Questions Submitted by Senator Arlen Specter

Q1 For many years, and increasingly so in the past few years, there has been concern that the automatic imposition of the treble damage remedy to all forms of antitrust violations was unfair and did not make legal or economic sense. A wide variety of business conduct comes under the antitrust laws ranging from such clearly anti-competitive conduct as price fixing and bid rigging, to ambiguous conduct which is open and may be found to violate the law only after a formal trial and appeal. Under the present law the degree of culpability, degree of participation, and degree of benefit, may vary widely. In short, under our present law the punishment does not have to fit the crime. And, in some cases, the crime isn't even clear. Under these circumstances socially beneficial conduct may be inhibited. The law may become a tool for plaintiffs to coerce defendants or extract money or business concessions. While no solution is ever perfect, I believe the administration's proposal, continuing treble damages for those cases involving the most egregious conduct while preserving compensation in other types of cases, provides the necessary balance of remedies to protect all parties concerned with the proper element of deterrence.

Q2 I would suggest there are few if any policy justifications for providing the United States with a treble damages remedy. The federal government should need no incentive to enforce the law. The federal government has all of the necessary resources to enforce the law and recover any damages. The present law provides for heavy fines and debarment. I believe that allowing the treble damage remedy will provide no additional deterrence under the circumstances and in fact, in some cases, might result in a reduction in the number of companies willing to do business with the government.

Q3 At the present time there is no deterrent and in fact there is an incentive for plaintiffs to cast their net wide and include every possible defendant in an antitrust case, regardless of guilt or innocence and regardless of whether there is any factual justification. The courts have been most reluctant to take any action under Rule 11. Once in the case and having no practical alternative, companys have paid substantial amounts for settlements to avoid litigation costs. The proposed change is an extremely modest one. It imposes a very high burden on the successful defendant. As a practical matter, it doesn't go far enough. I would suggest that if prevailing plaintiffs are to be awarded attorneys' fees, then prevailing defendants should also be automatically awarded attorneys' fees. In other words, it isn't good enough to have half an exception to the English rule.

Answers to Questions for the Panels

Q1 Yes. Under the administration's proposal, treble damages would be available in overcharge and undercharge cases. These are the case which would involve the most egregious conduct and the availability of treble damages coupled with the prospect of criminal penalties should provide adequate deterrence for such conduct. On the other hand, other cases which may involve illegal, but ambiguous, open conduct or may involve simple commercial disputes would be subject to an actual damage remedy. To the extent that the application of a punitive treble damage in the past has inhibited socially desirable conduct, and I believe it has, under the proposed law competitive conduct would be encouraged in those areas.

Q2 I do not agree that the federal government should recover treble damages. An actual damage remedy provides adequate compensation. The government should need no additional incentive to enforce the law. It has ample tools available. All of the governments prosecutional resources and other investigative tools can be brought to bear in ferreting out those that price fix on government contracts. In addition, debarment procedures are available as the ultimate deterrent. I believe that the additional prospect of becoming involved in treble damage suits along with the other remedies could inhibit some companies from doing business with the government.

Very truly yours,

Thomas R. Long

Thomas R. Long
Senior Vice President
and General Counsel

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Mr. **Starling**. Thank you very much, Mr. Long.

As you know, it does not often happen that we are caught without a chairman. Senator Thurmond was called to the floor to work on the Defense Reorganization Act and he was not able to come back.

So we thank you all very much for your participation in the hearing. A number of Senators did have written questions they have asked us to mail to you. We will do that. Thank you again for coming.

[Whereupon, at 11:52 a.m., the committee was adjourned.]

APPENDIX

STATEMENT
OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers appreciates this opportunity to submit a statement commenting on S. 1300 - joint and several liability - and S. 2162 - that portion dealing with antitrust claim reduction.

The National Association of Manufacturers is a voluntary business association of over 13,200 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ approximately 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The NAM again, as it said in its testimony of July, 1985, wishes to express strong support for S. 1300. The NAM recently reviewed the newly-introduced Administration proposal S. 2162 which provides for "claim reduction" in antitrust cases. The NAM appreciates the effort of the Department of Justice to resolve a serious problem in antitrust cases whereby plaintiffs are able to exert tremendous pressure on multiple defendents to settle potentially expensive lawsuits. The present system for litigating private antitrust cases results in asserting enormous pressure on defendants and is unfair. Mandatory treble damages, class actions, a virtually unlimited statute of limitations because of the concept of fraudulent concealment, and allowing soft evidence of conspiracy and damages to be considered by a jury all combine to cause a great risk that defendants, even an innocent defendant, may be found liable for extraordinary amounts of damages. The possible amount of damages and risk are compounded by the application of the rule of joint and several liability. This rule makes one defendant responsible for the total judgment, including damages attributable to settling defendants. Plaintiffs' lawyers use the pressure generated by this system to force companies to settle without consideration of the merits. By holding out the prospect of a business-threatening judgment, plaintiffs' lawyers are able to play one defendant off against another. Wrong doers may escape liability by settling early and cheap. Innocent and small companies may be forced to pay disproportionately large settlements. Innocent companies may be forced to pay substantial settlements rather than defend themselves. In the Corrugated and Plywood litigation a few years ago the economic health of firms was threatened by the prospect of having to pay ruinous judgments attributable to the damages caused by others.

After reviewing the claim reduction provision in S. 2162 and the joint and several liability provision in S. 1300, the NAM still favors the approach found in S. 1300. Although claim reduction offers some relief, unfairness, complexity and delay can still be caused by claim reduction, and the NAM's members believe that S. 1300 is a more complete reform package that by its simplicity helps all parties in antitrust cases. We are hopeful that a compromise solution to this problem, using the best aspects of both bills, can be worked out between the supporters of S. 1300 and S. 2162. However, if not, we strongly urge that S. 1300 be moved through the legislative process.

S. 1300 would eliminate the serious injustice caused by the application of joint and several liability. The simple solution provided by S. 1300 is to make each defendant in a horizontal price fixing or similar case individually responsible for the treble damages it caused. Culpable defendants would be held fully accountable by being required to pay a fair share of the treble damages. Innocent firms could not longer be coerced into unfair settlements by the threat of being held liable for a disproportionately large amount of the treble damages. Allocation of antitrust liability would no longer depend on the whims of plaintiffs' lawyers.

As the NAM has pointed out in connection with its past support of contribution and claim reduction legislation, antitrust remedies reform is needed to stop the abuses caused by the existing rule which holds each defendant in an antitrust case, regardless of its market share, size, or relative culpability, potentially liable for three times the total damages assessed.

The several inequities and abuses inherent in the current antitrust remedies system have been well-documented in prior hearings before this Committee in prior Congresses. Because antitrust damage shares may be arbitrarily manipulated by plaintiffs without regard to culpability, defendants with small market shares and culpability have often been coerced into paying exorbitant settlements, while larger and more culpable defendants have sometimes paid much less or nothing at all. Moreover, the threat of massive liability has been used to whipsaw unjust settlements from even innocent companies and to threaten the continued financial viability of otherwise healthy firms. These arbitrary and patently unfair results were never intended by Congress.

Although the NAM has supported contribution and claim reduction legislation, there is concern over whether such legislation would provide the best approach for solving the joint and several liability problem in antitrust cases and its effective date. A new consensus proposal has been developed which the entire business community and Congress can support. The NAM, along with other concerned business groups, joins in endorsing S. 1300 as the best approach for eradicating the inequities caused by the combination of joint and several liability and mandatory treble damages. It alleviates the unfairness of the current system with less complexity and litigation costs than contribution legislation. It is applicable only to suits commenced after the date of its enactment. It has broad-based support in the business community and we are not aware of opposition.

The NAM believes that S. 1300 would also help strengthen the deterrence of antitrust violations. All antitrust violators will be held fully accountable. Plaintiffs' lawyers will no longer be able to make sweetheart settlements with culpable defendants. By preventing plaintiffs from recovering damages attributable to the purchases or sales of companies which it chooses not to sue, S. 1300 would significantly increase the likelihood that all antitrust violators would be named as defendants and required to pay their full share of treble damages. The possibility of a violator escaping liability would thus be significantly reduced. The interests of plaintiffs are fully protected under S. 1300. The treble damages attributable to antitrust violators outside the jurisdiction or financially unable to pay would be collectable from other defendants.

It should be noted that the United States is the only country in the world in which mandatory treble damages is combined with joint and several liability in private antitrust cases. Under the present system the economic health of American firms is threatened and their ability to compete abroad is undermined.

In sum, S. 1300 is a long-awaited consensus solution to the antitrust remedies problems which Congress has been grappling with for the past several years. The NAM strongly endorses this legislation and stands ready to assist this Committee and Congress in any way that it can to support the bill's enactment.

In view of the broad-based support and need for this legislation, we urge the Committee to mark up and report out S. 1300 at an early date.

Statement of The Business Roundtable Comparing S. 1300 and S. 2162

My name is John D. Ong and I submit this statement on behalf of the Business Roundtable. I am Chairman of the BFGoodrich Company and I also am Chairman of the Business Roundtable's Antitrust and Government Regulation Task Force. William Crawford, the former head of that Task Force's Lawyers' Advisory Committee, has already testified in support of S. 1300, and I do not intend to revisit the substance of that testimony, other than to state that I agree with it. The purpose of my statement is to compare S. 1300 with the so-called "claim reduction" provisions contained in Title IV of the Administration's proposed bill 1/ and to explain why the Roundtable continues to believe that S. 1300 is preferable. We also, however, offer constructive suggestions for improvement of the claim reduction proposal.

In order to highlight the differences between the two bills, it might be useful to review the historical background of both. In 1981, the Supreme Court ruled definitively that defendants in antitrust cases could not enforce rights of

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1/ The Antitrust Remedies Improvements Act of 1986 (S. 2162).

contribution against each other; 2/ therefore, a single company could be liable for the damages caused by all companies in an entire industry. The opinion of the Court recognized that a non-contribution rule could lead to harsh results, but stated that Congress had to solve the problem. In response to the Supreme Court's decision, the Antitrust Equal Enforcement Act (S. 995), was introduced and given extensive consideration in the 97th Congress. 3/ S. 995 had two basic elements: "contribution" and "claim reduction."

Under the contribution concept, joint and several liability was preserved, and a plaintiff was free to collect full damages from any defendant he chose. However, a defendant who had been forced to pay could bring an action to compel others to "contribute" their proportionate share of the damages. In the typical horizontal conspiracy case, that share would be determined by relative sales of the products in question. Under the claim reduction concept, when a defendant settled, the full damages attributable to that defendant's sales would be deducted from the overall damages--instead of any smaller settlement amount. This would prevent a plaintiff

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2/ Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981).

3/ Actually, S. 995 was not the first attempt to authorize contribution. Senator Bayh's S. 1468, introduced in the previous Congress, also created a right of contribution.

from using cheap and early settlements to exert progressively increasing pressure on those defendants who might otherwise be anxious to defend themselves at trial. This unfair settlement technique has come to be known as a "whipsaw."

It soon became apparent that there were some technical difficulties with S. 995. 4/ In particular, litigation of contribution claims after judgment for a plaintiff would not only add complexity and burden to antitrust litigation, but it would inevitably tend to foster divisive disputes earlier in the litigation.

S. 1300 embodies a better and simpler idea. Contribution would be unnecessary and claim reduction would be accomplished automatically if joint-and-several liability were simply abolished in horizontal conspiracy cases. Each defendant would face certain liability for treble damages based on its own sales--no more, no less--and plaintiffs could not profitably play defendants off against each other. The plaintiff would not lose any legitimate benefit, however, because co-defendants could be liable for treble damages on the sales of companies which were beyond jurisdictional reach or which were judgment proof. In short, S. 1300 provides a

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4/ See, e.g. Cellini, The Effect of Contribution on Litigation and Settlement: The Defendant's Viewpoint, 48 Antitrust L.J. 1599 (1979).

clearcut and fair solution to serious problems, and the Roundtable has supported it.

Unfortunately, the Administration has objected to S. 1300, primarily because the Department of Justice believes the uncertainty generated by joint-and-several liability is likely to deter antitrust violations. 5/ The Administration has proposed instead the more limited claim-reduction approach, which is embodied in Title IV of S. 2162. This approach does help to solve the "whipsaw" problem, because progressive settlements will not increase the relative exposure of the remaining defendants. S. 2162, however, has major shortcomings:

First, it is fundamentally unfair to hold an individual defendant liable--three times over--for damages which other defendants have caused. This unfairness was something which the original contribution bills sought to remedy, and it was considered so serious that the somewhat cumbersome procedures contemplated by those bills nevertheless attracted widespread support. For example, Professor Lawrence Sullivan, who is a well-known advocate of vigorous antitrust

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5/ This is not the place to argue the deterrance question, but we in the Roundtable continue to believe that certain liability for your own conduct is at least as powerful a deterrent as uncertain liability for something more, something less, or nothing at all. Moreover, criminal and injunctive sanctions provide a powerful additional deterrent.

enforcement, expressed his support for contribution as follows: 6/

> ". . . contribution ensures that a larger number of violators are ultimately subject to liability. Contribution thus maximizes the deterrence goal of certainty of punishment. Moreover, considerations of fairness dictate that less culpable wrongdoers should not satisfy the entire liability merely because of a 'plaintiff's whim or spite, or his collusion with the other wrongdoer.'"

S. 1300 would address these concerns in an even simpler way; S. 2162 does not address them at all.

Second, even in the claim reduction area, S. 2162 is incomplete because it may not come into play unless there has been some overt release from "liability or potential liability." (See proposed Sec. 41(a) of the Clayton Act.) What happens if a defendant simply isn't sued at all, but there is no evidence of a release or covenant not to sue? There may be many situations where a plaintiff fails to sue a significant defendant--perhaps because there is some unwritten understanding about cooperation in the litigation; perhaps because there are some assurances about future business relationships; perhaps because the plaintiff simply does not want to tackle a particularly tough adversary. It is unclear

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6/ See Senate Judiciary Committee, Report No. 97-359, The Antitrust Equal Enforcement Act, 97th Cong., 2d Sess., at pp. 17-18 (1982).

whether the claim reduction provisions of S. [illegible] would apply in these situations, but the potential for a "whipsaw" of the remaining defendants is still serious.

We believe that a relatively simple modification of S. [illegible] would remedy a portion of these shortcomings. There really is no reason to treat defendants who have formally settled out any differently than potential defendants who have been let off by operation of a more informal process. If defendants not sued were treated like defendants who had settled, it would mean that the claim reduction concept, at least, would work as it should, even though other serious problems remain.

The Business Roundtable recognizes, as a practical matter, that legislation which the Justice Department is able to accept will have a better chance of passage. We also recognize that a partial remedy in this difficult area is better than nothing at all. We therefore would be prepared to support Title IV of S. [illegible], if it were modified appropriately to ensure that the claim-reduction concept applied to defendants not sued as well as to defendants who settle. A modified S. [illegible] is not the best possible solution, in our view, but it would provide substantial benefits.

([illegible])

Statement of the Business Roundtable In Support of S. 2162

My name is John D. Ong. I am Chairman of the BFGoodrich Company. I am also Chairman of the Business Roundtable's Antitrust and Government Regulation Task Force.

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and type of business. The Roundtable was founded in 1972 in the belief that business executives should take an increased and open role in continuing debates about public policy. The companies represented by the Roundtable are substantial producers and purchasers of goods and services. Many Roundtable companies have been involved in antitrust cases as plaintiffs as well as defendants. They have received some of the largest treble damage awards and settlements in antitrust history. So, contrary to popular belief, the Roundtable's members do not view antitrust reform solely from a defendant's perspective.

The Roundtable supports the remaining portions of S. 2162 1/ which modify the treble damage remedy in private

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1/ The claim reduction provisions of S. 2162 are included in S. 1300, which the Committee adopted on May 8, 1986. The Roundtable supports S. 1300.

antitrust litigation and which permit defendants' attorneys' fees in appropriate cases.

A. Treble Damages

The treble damages remedy was originally established 96 years ago to encourage private enforcement of the antitrust laws. It was established 2/ in a very different social and economic climate than we face today. There have been dramatic changes since that time in both the structure of American industry and our understanding of the economic consequences of business behavior. Section 4(a) of the Clayton Act should be amended to reflect those changes.

When the treble damages remedy was established, giant "trusts" wielded enormous economic and political power. They were genuine cartels, and the anticompetitive consequences of their conduct were obvious. 3/ Because Congress feared that small businesses injured by anticompetitive conduct might be reluctant to challenge conduct of the trusts, it provided for multiple damages to encourage private enforcement. 4/

2/ Treble damages were first provided in Section 7 of the Sherman Act, passed in 1890, which was superceded by Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), passed in 1914.

3/ *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

4/ 21 Cong. Rec. 2568-70 (1890).

The world has changed a great deal since 1890. Private enforcement continues to be viewed as an important adjunct to government criminal and injunctive enforcement. But, the giant trusts are gone, and the Sherman Act is being applied to some conduct that is no longer as clear-cut and obviously anticompetitive as the conduct Congress addressed in enacting the Sherman Act. On the contrary, rules of absolute per se illegality are now applied to relatively few business practices. Even tying arrangements and some group boycotts, which formerly were viewed as per se illegal, 5/ are not illegal in the absence of market power. 6/

Indeed, conduct that was once thought to be anticompetitive is now recognized as procompetitive. For example, in Schwinn, the Supreme Court held that vertical territorial restraints were per se illegal. 7/ But only ten years later, Schwinn was overruled by Sylvania. The Court recognized that while vertical restraints may limit intrabrand

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5/ See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

6/ See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985).

7/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

competition, they actually promote interbrand competition. 8/ These restraints encourage dealers to invest capital and effort, as well as to provide service and repair facilities, and thereby effectively promote the manufacturer's product in competition with similar products of other manufacturers. As a result, non-price vertical restraints are now analyzed under the rule of reason, which requires that their procompetitive benefits be balanced against any anticompetitive consequences. These developments highlight the obvious fact that the antitrust laws are imprecise, and even experienced antitrust lawyers often have difficulty advising clients about the possible consequences of their conduct.

Moreover, the balance of litigation power has shifted as well. Antitrust cases no longer involve only small businesses pitted against giant industrial companies. On the contrary, as I stated earlier, major corporations are now plaintiffs in antitrust cases -- sometimes arrayed in massive classes. We also see many small businesses as defendants.

S. 2162 seeks to address these changed circumstances without discouraging private enforcement. Treble damages would remain available to private parties damaged by the most harmful anticompetitive conduct, such as price fixing, bid rigging, and

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8/ Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

market division. Buyers forced to pay higher prices (or sellers who are underpaid) would still be entitled to obtain treble damages. Private plaintiffs seeking to recover lost profits would recover actual damages. Typically, actions for lost profits are based on conduct which is equivocal in its competitive effect and which therefore should not be subject to treble damage penalties. In order to insure that single-damage plaintiffs are made completely whole, they normally would also recover prejudgment interest on their actual damages from the date of injury. We do urge, however, that the bill be modified to provide that prejudgment interest runs from the date of the complaint. This should yield adequate compensation since single-damage actions will involve practices that are open and subject to prompt challenge. The change would also be consistent with existing law on prejudgment interest, Clayton Act § 4(a), 15 U.S.C. § 15(a) (1982). 9/

There is no factual support for the claim that S. 2162 will unduly discourage private damage actions. The securities laws or the common law governing business contracts do not provide for treble damages, and there is no shortage of litigation in those areas, even though the cases may be complex. S. 2162 recognizes that it is undesirable to give

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9/ The existing right of a successful plaintiff to recover attorneys' fees and costs would be unaffected by S. 2162.

particular encouragement to antitrust litigation over conduct that may well be procompetitive, and that it is unjust to subject defendants to treble damage penalties for conduct that they could not know was wrong before the case is concluded.

B. Defendants' Attorneys Fees

Title III of S. 2162 would permit defendants to recover attorney's fees if the plaintiffs' conduct was "frivolous, unreasonable, without foundation, or in bad faith." It therefore continues Congress' efforts to eliminate frivolous litigation and bad faith tactics, which began with its 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 was amended because it was evident that judges have been unwilling to impose sanctions for dilatory behavior. 10/

The Supreme Court has stated that sanctions must be available "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but [also] to deter those who might be tempted to such conduct in the absence of such a deterrent." 11/ While Rule 11 has improved litigation practices, and some judges are now imposing sanctions for

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10/ See Report to the President of the National Commission for Review of Antitrust Laws and Procedures 83 (1979).

11/ National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)(per curiam).

dilatory motions and discovery techniques, there is still a need for further improvement. Authorization of attorney's fees to substantially prevailing defendants under the circumstances described in S. 2162 will further emphasize Congress' intention that neither side in antitrust litigation should engage in abusive or dilatory tactics. It will also discourage such obviously improper suits as injunctive actions filed solely to delay, and thereby possibly prevent, a merger that will produce a strong competitor to challenge the plaintiff. As S. 2162 is drafted, however, plaintiffs who proceed in good faith will have nothing to fear.

Conclusion

For these reasons, the Roundtable urges this Committee to continue its efforts to modernize the antitrust laws to take into account the competitive realities of today. The Roundtable supports treble damage reform and defendants' attorney's fees as provided in S. 2162.

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